THE

LAW OF CRIMES

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PREFACE TO THE TWELFTH EDITION.

THAT a new edition of this work should be called for in less than two years from the publication of the last edition is a striking testimony to its popularity with the profession at large. As imitation is the sincerest form of flattery, it is refreshing to find that the general plan, arrangement, and the scheme of this Commentary have been either ingeniously or servilely copied by succeeding annotators on the Code! In one case the likeness has so far gone that various headings of the subject-matter in this Commentary appear *verbatim et literatim*. Had plagiarism been an offence under the Penal Code, it would have been interesting to read what such annotator had to say in expounding it!

This edition has been carefully revised in the light of five hundred new cases added to it. It contains forty pages of fresh matter.

The text of the Code embodies all amendments up-to-date.

R. R.

January, 1930. D. K. T.

EXTRACTS FROM THE PREFACE TO THE THIRD EDITION

The commentary under each section is divided into three Parts first comes Comment, secondly, Cases, and thirdly, matter pertaining to Practice

As to COMMENT —The object of a section as foreshadowed in the Note of the authors of the Code, or in the two Reports of the Indian Law Commissioners or in the Proceedings of the Legislative Council, has been fully stated Wherever the scope of a section has been the subject of judicial criticism it has been carefully explained Wherever the meaning or principle of a section is elucidated in a judicial pronouncement excerpts from it have been given Every judicial interpretation and construction of a word, phrase or clause, in a section, has been given, as much as possible, in the *ipsissima verba* of Judges For facility of reference the words, expressions and clauses commented upon are capped with figures in the text and are repeated in the Comment as sub headings with corresponding numbers

As to CASES —The cases bearing on each section have been arranged into cognate groups, each group illustrating some clause

As to PRACTICE —This part is sub divided into two main headings first comes Evidence and, secondly, Procedure

Under Evidence all points necessary for the prosecution to prove, in order to bring a charge home to the accused, are categorically stated and questions relating to onus, mode of proof, and admissibility or non admissibility of evidence are discussed

Under Procedure fall the contents of the second schedule of the Code of Criminal Procedure, questions concerning Jurisdiction, Sanction, and measure of Punishment, references to Criminal Circulars issued for the guidance of subordinate Judiciary and Magistracy by all the High Courts, Chief Courts, and Judicial Commissioners' Courts, and, lastly, forms of charges for various offences

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EXTRACT FROM THE PREFACE TO THE NINTH EDITION

All Indian decisions, whether reported in the official or non official series of law reports, have been incorporated in this work Mr Justice West observed in the Full Bench case of *Empress* v *Moorga Chetty* (5 Bom 338, 362) that "the framers of the Indian Penal Code regarding the English system as 'artificial,' 'complicated' 'framed without the slightest reference to India,' and very 'defective' declined to make it more than any local system the ground work of the Code Cases decided in England, therefore, must be received in India with a careful allowance for the great difference of the law in the two countries" The authors have, therefore, considered it unsafe to burden the comment with English precedents where the Code differs from the criminal law of England Such a course, instead of lightening the labours of those who seek for a clear interpretation of the provisions of the Code, merely creates unavoidable pitfalls English cases have been, however, copiously referred to where the English criminal law is on all fours with the Indian Penal Cade

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Car & M	Carrington and Marshman, 1840—1842, N P.
C & M	Crompton and Meeson 1832—1834, Exch
C & P	Carrington and Payne, 1823—1841, N P
Ch	Law Reports Chancery Division, from 1891—
Ch D	Chancery Division, Law Reports, 1875—1890,
Cl & I	Clark and Finnelly, 1831—1846, N P
Coke	Coke s Reports, 1702—1816
Collett	Collett s Comments on the Indian Penal Code
Cox	Cox s Criminal Cases from 1843—
Cr App R	Criminal Appeal Reports, from 1908—
Cr C	Criminal Cases from 1929—
Cr & J	Crompton and Jervis, 1830—1832
Cr L J	Criminal Law Journal of India from 1904—
Cranch	Cranch s Reports, Supreme Court of the United States 1800—1815
Cr R	Criminal Rulings of the Bombay High Court, 1862—1910
Crim P C	Criminal Procedure Code, 1898
Cro Car	Croke s Reports, in the reign of Charles I
Cro Eliz	Croke s Reports in the reign of Elizabeth
D & B	Dearsley and Bell, 1856—1858, Crown Cases
D & P	Dearsley and Pearce s Crown Cases
Day E C	Day s Election Cases
Dears	Dearsley s Crown Cases, 1852—1856
Den C C	Denison s Crown Cases, 1844
Doug	Douglas s Reports 1778—1784, K B
East	East s Reports, 1801—1812 K B
East P C	East s Pleas of the Crown
E & B	Ellis and Blackburn 1853—1858 Q B
Esp	Espinasse's Reports 1793 1797, N P
Exch	Exchequer Division Law Reports, 1875—1880
F B	Full Bench
F & F	Foster and Finlayson, 1858—1867, N P
Foster s	Foster s Crown Law
Gaz of Ind	Proceedings of the Supreme Legislative Council *The Gazette of India* Part VI
Hagg	Haggard s Reports
Hale s P C	Hale s Pleas of the Crown
Hare	Hare s Reports, 1841—1853
Hawk P C	Hawkins Pleas of the Crown
Hay	Hay s Reports, 1862—1863 Calcutta.
H & C	Hurlstone and Coltman, 1862—1865, Exch
H L	House of Lords
Hob	Hobbart s Reports
Hyde	Hyde s Reports, 1863—1864 Calcutta.
I A	Indian Appeals from 1873—
I C	Indian Cases.
I R	The Irish Reports, from 1901—
Ibid	Same as above
Ilbert	Ilbert s Government of India
Ind. Jur N S	Indian Jurist, New Series 1866—1867, Calcutta
„ O S	Indian Jurist, Old Series, 1862, Calcutta

J. P.	..	Justice of the Peace, from 1836—
Jeremy Bentham	..	Bentham's Works, Vols. 1—11.
Keb.	..	Kebles' Reports, 1661—1679, K. B.
Kel.	..	Sir John Kelyng's Reports, 1673—1706, K. B.
L. B. C. M.	..	Lower Burma Court Manual, 1912.
L. B. R.	..	Lower Burma Rulings, 1901—1922.
L. H. C. R. & O.	..	Lahose High Court Rules and Orders, 1929.
L. J. C. P.	..	Law Journal, Common Pleas, from 1822—
" Ch.	..	Law Journal, Chancery.
" Ex.	..	" " Exchequer.
" M. C.	..	" " Magistrate's Cases.
" Mat.	..	" " Matrimonial Cases.
" P. M. & A.	..	" " Probate, Matrimonial and Admiralty.
" Q. B.	..	" " Queen's Bench.
L.L. J.	..	Lahore Law Journal, from 1920—
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" C. C. R.	..	" " Crown Cases Reserved.
" Ch.	..	" " Chancery.
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" H. L.	..	" " House of Lords
" I. A.	..	" " Indian Appeals
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L. & C.	..	Leigh and Cave's Crown Cases, 1861—1865.
L. T.	..	Law Times, 1845—1858.
L. T. N. S.	..	Law Times, New Series, from 1859—
L. W.	..	Law Weekly, Madras, from 1914.
Lah.	..	Indian Law Reports, Lahore Series, from 1920—
Lah. C.	..	Lahore Cases, 1924—1925.
Ld. Raym.	..	Lord Raymond's Reports, 1694—1734, K. B. and C. P.
Leach	..	Leach's Crown Cases, 1730—1788.
Lee Warner	..	Lee Warner's Native States of India.
Lewin	..	Lewin's Crown Cases, 1882—1833.
Livingstone	..	Livingstone's System of Penal Code for Louisiana.
Lof.	..	Lofft's Reports, 1772—1774, K. B.
Luck.	..	Indian Law Reports, Lucknow Series, from 1926—
Luck C.	..	Lucknow Cases, 1927.
Mad.	..	Indian Law Reports, Madras Series, from 1876—
Mad. Jur.	..	Madras Jurist.
M. Cr. C.	..	Madras Criminal Cases, from 1928—
M. H. C.	..	Madras. High Court Reports, 1862—1875.
M. H. C. R. P.	..	Madras High Court Rules of Practice, 1912.
M. L. J.	..	Madras. Law Journal Reports, from 1891—
M. L. T.	..	Madras Law Times, 1906—1925.
M. W. N.	..	Madras Weekly Notes, from 1910—
Marsh	..	Marshall 1813—1816, C. P. Marshall 1862—1863, Calcutta.
Maxwell	..	Maxwell on the Interpretation of Statutes.
Mayne	..	Mayne's Criminal Law of India.
M. Dig.	..	Morley's Digest, Calcutta.
M. & M.	..	Morgan and Macpherson's Indian Penal Code.

Mood Cr C.	Moody's Crown Cases Reserved, 1824—1844
M I A	Moore's Indian Appeals, 1836—1873, P C
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M & W	Meeson and Welby, 1836—1847, Exch
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N A R	Nizamut Adawlat Reports, Bengal
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Note	Notes appended to the Draft Penal Code, 1836
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O C	Oudh Cases, 1898—1926
O D	Oudh Decisions
O S C.	Oudh Select Cases
O C. D	Oudh Criminal Digest
O M & H	O Malley & Hardcastle s Election Cases
O W N	Oudh Weekly Notes, from 1924—
P C	Privy Council
P C R & O	Punjab Chief Court Rules and Orders 1911
P J L. B	Printed Judgments of Lower Burma, 1893—1900
P L C	Proceedings of the Legislative Council of the Governor General of India.
P L. J	Patna Law Journal 1916—1921
P L R	Punjab Law Reporter, from 1900—
P L T	Patna Law Times from 1920—
P L W	Patna Law Weekly, 1917—1918
P R	Punjab Record, 1862—1919
P W R.	Punjab Weekly Reporter, 1906—1923
Palm	Palmer s Reports, 1619—1669, K B
Parl Rep	Parliamentary Reports
Pat	Indian Law Reports, Patna Series from 1922—
Pat L. R	Patna Law Reporter, 1923—1925
Paterson	Paterson on the Liberty of the Subject
Perry O C.	Perry's Oriental Cases 1843—1845
Phillimore	Phillimore on the International Law
Philips	Philips Comparative Criminal Jurisprudence
Price	Price s Reports, 1814—1824, Exch.
Q B	Queen s Bench, Law Reports from 1891—
Q B D	Queens Bench Division Law Reports, from 1875—1890
Ran	Indian Law Reports, Rangoon Series, from 1923—
Rep 1st	First Reports on the Penal Code by the Indian Law Commissioners, 1846
Rep 2nd	Second Report on the Penal Code by the Indian Law Commissioners, 1847
R J P J	Revenue, Judicial and Political Journal, Calcutta
R. R	Revised Reports
R & R.	Russell and Ryan's Crown Cases, 1799—1823
Rob	Robert s Reports 1844—1853.
Roscoe	Roscoe's Criminal Evidence, (14th Edn 1921)
Russell	Russell on Crimes and Misdemeanours (8th Edn 1923)

S. D. S. S. C.	..	Selected Decisions of Sind Sadar Court, 1866—1906.
S. L. J. B.	..	Select Judgments, Lower Burma, 1872—1892.
S. L. R.	..	Sind Law Reporter, from 1907—
Salk.	..	Salkeld's Reports, 1669—1712.
Stephen	..	Stephen's History of the Criminal Law of England.
Stephen Dig. Cr. L.	..	Stephen's Digest of Criminal Law.
Step. Com.	..	Stephen's Commentaries on the Laws of England.
Stokes	..	Stokes' Anglo-Indian Codes.
Str.	..	Strange's Reports, 1795, K. P.
St. Tr.	..	State Trials.
Sup.	..	Above.
Sw. & Tr.	..	Swabey and Tristan, 1858—1865.
Sty.	..	Style's Reports, 1645—1646, K. B.
Taunt.	..	Taunton's Reports, 1807—1819, C. P.
T. L. R.	..	The Times Law Reports, from 1885—
T. R.	..	Durnford and East's Term Reports, 1785—1800, K. B.
Tupper	..	Tupper's Our Indian Protectorate.
Ubi sup.	..	See above.
Unrep. Cr. C.	..	Unreported Criminal Cases of the High Court of Bombay, 1862—1898.
U. B. C. M.	..	Upper Burma Court Manual.
U. B. R.	..	Upper Burma Rulings, 1892—1922.
U. P. L. R.	..	United Provinces Law Reporter, 1919—1922.
Vent.	..	Ventries Reports, 1688—1691, K. B. & C. P.
Ves.	..	Vesey's Reports, 1789—1817.
Weir	..	Weir's Law of Offences and Criminal Law (4th Edition 1905).
Wharton	..	Wharton's Law Lexicon, 13th Edn.
Wilson	..	Wilson's Reports, 1805—1817, K. B. & C. P.
W. R.	..	Sutherland's Weekly Reporter, 1862—1875, Calcutta.
W. R. Cr. L.	..	Sutherland's Weekly Reporter, Criminal Letters.
W. R. (Eng.)	..	Weekly Reporter, (Eng.), 1882—1906.
Wym. Cr.	..	Wyman's Revenue and Criminal Rulings.

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S. 5 repealed in part by	Act XIV of 1870, (Schedule).
Ss. 34, 40, 56, 131, 194, 195, 222, 223 and 207 amended and ss. 121A, 124A, 225A, 294A, and 304A added by	Act XXVII of 1870, ss. 1-12.
S. 230 amended by..	Act XIX of 1872, s. 1.
Ss. 178 and 181 amended by	Act X of 1873, s. 15.
Illustration (*a*) to s. 19 amended as to N. W. Provinces by	Act XII of 1881, s. 2.
Ss. 40, 64, 67, 71, 73, 214, 309, 335, 410 and 435, amended by	Act VIII of 1881, ss. 1—10.
Illustrations to s. 214 repealed by	Act X of 1882, (Schedule).
Ss. 40, 64, 75, 216, and 225A amended and s. 225B added by	Act X of 1886, ss. 21—24.
S. 138A added by	Act XIV of 1887, s. 29.
Ss. 162 and 163 amended by	Act XVIII of 1887, s. 18.
S. 28 amended by	Act I of 1889, s. 9.
Ss. 478 and 489 amended by	Act IV of 1889, s. 3.
Explanation 1 to s. 193 repealed in part by ..	Act XIII of 1889, (Schedule).
Ss. 194 and 195 amended by	Act IX of 1890, s. 149.
S. 375 amended by..	Act X of 1891, s. 1.
Ss. 1, 2, 4, 15 and 410 repealed in part, and *Illustration* (*c*) to s. 307 amended by	Act XII of 1891, (Schedule).
Ss. 177, 203 and 212 amended and ss. 216A and 216B added by	Act III of 1894, ss. 5—8.
Ss. 182 and 294 amended and ss. 263A and 477A added by	Act III of 1895, ss. 1—4.
S. 230 amended by..	Act VI of 1896, s. 1.
S. 4 substituted by..	Act IV of 1898, s. 2.
S. 108A added by	Act IV of 1898, s. 3.
S. 124A substituted by	Act IV of 1898, s. 4.
S. 153A added by	Act IV of 1898, s. 5.
S. 505 substituted by	Act IV of 1898, s. 6.
Ss. 489A, 489B, 489C, 489D added by	Act XII of 1899, s. 2.
S. 75 substituted by	Act III of 1910, s. 2.
Chap. V-A added by	Act VIII of 1913, s. 3.
Chap. IX-A added by	Act XXXIX of 1920, s. 2.
Ss. 61 and 62 repealed by and ss. 121, 121A and 122 amended by	Act XVI of 1921, ss. 2, 3, 4.
S. 366 amended by and ss. 366A and 366B substituted by	Act XX of 1923, ss. 2, 3.
Ss. 372 and 373 amended by	Act V of 1924, s. 2.
Ss. 372 and 373 amended and Explanations I and II to s. 372 and s. 373 added by	Act XVIII of 1924, ss. 2, 3, 4.
Ss. 490 and 492 repealed by	Act III of 1925.
Ss. 292 and 293 substituted by	Act VIII of 1925, ss. 2, 3.
Ss. 375 and 376 amended by	Act XXIX of 1925, ss. 2, 3, 4.
Ss. 5, 21, Heading to Chap. VII, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140 and 505 amended by	Act X of 1927.
S. 295A inserted by	Act XXV of 1927.

THE

LAW OF CRIMES.

THE INDIAN PENAL CODE (ACT XLV OF 1860)

Received the assent of the Governor-General on October 6, 1860

CHAPTER I

INTRODUCTION

Preamble

WHEREAS it is expedient to provide a general Penal Code for British India[1] It is enacted as follows —

Title and extent of operation of the Code

1. This Act shall be called the Indian Penal Code and shall take effect throughout the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Victoria, Chapter 106[2], entitled "An Act for the better Government of India".

COMMENT

The Indian Penal Code was drafted by the first Indian Law Commission of which Mr (afterwards Lord) Macaulay was the President and was submitted to the Governor General of India in Council in 1837 The draft Code underwent further revision at the hands of Sir Barnes Peacock and several others and in 1860 it was placed on the Indian Statute Book

Prior to 1860 the English criminal law, as modified by several Acts was administered in the Presidency towns of Bombay, Calcutta and Madras[1] In the Mofussil the Courts were principally guided by the Mahomedan criminal law, the glaring defects of which were partly removed by Regulations of the Local Governments In 1827, the system of administration of justice in the Presidency of Bombay was thoroughly revised and from that time the law which the criminal Courts administered was set forth in a Regulation[2] But in the other two sister Presidencies the Mahomedan criminal law was in force till the Indian Penal Code came into operation

The criminal law of India has been codified in the Penal Code and the Criminal Procedure Code, the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the common law of England in such matters at all[3] The Penal Code is the substantive law and the Criminal Procedure Code

[1] 9 Geo IV c 74 Acts VII and XIX of 1837 Act XXXI of 1838, Acts XXII and XXXI of 1839, Acts VII and X of 1844, Act XVI of 1852

[2] XIV of 1827

[3] *Gopal Naidu* (1922) 46 Mad 605 F B

2. 'The whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Vic., c. 100'.—Section 1 of this Statute, which has now been repealed by the Government of India Act, 1915 (5 & 6 Geo V, c 61), enacted ' The Government of the territories now in the possession or under the Government of the East India Company, and all powers in relation to Government vested in or exercised by the said Company in trust for Her Majesty, shall cease to be vested in or exercised by the said Company, and all territories in the possession or under the Government of the said Company, and all rights vested in or which if this Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in Her name, and for the purposes of this Act *India* shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid"

The words "may become vested" signify that territories which come under the jurisdiction of the Government of India, though not forming part of British India, will be governed by the Code, e g , Burma

The Code has been extended to outlying parts of British India (*a*) by notification under the Scheduled Districts Act, 1874, and (*b*) by Regulations under 33 & 34 Vic , c 3[1] —

With modifications in the Chittagong and Kachin Hill tracts[13]
The Chin Hills[14]
Upper Burma generally, except the Shan

Laccadive Islands[9]
Zanzibar[10]
British Baluchistan[11]
Angul and the Khondmals[12]

Abyssinia[20]
Muskat[21]
Bahrein[22]
The territories of the Shaikh of Kuwait[23]

On the frontier of Sindh the Penal Code is superseded by Regulation V of 1872 and Regulation III of 1892[24] so far as these Regulations are inconsistent with the provisions of the Code

1 Repealed by the Government of India Act, 1915 Section 130 of this Act says that such repeal will not affect the validity of any regulations issued
2 Act V of 1867
3 G I 30th October 1869 Notification No 4918 of 27th October 1869
4 Reg III of 1872 as amended by Reg III of 1899
5 Reg IX of 1874 s 3
6 Act XIV of 1874, s 3 (a) G I, 1876, Part I p 505
7 *Ibid*, p 504
8 Government Notification, dated the 13th February 1884, *Mangal Tekchand*, (1886) 10 Bom 258
9 *Chena Koya*, (1890) 13 Mad 353, The Laccadive Island and Minicoy Reg I of 1913
10 Zanzibar Order in Council, 1914, G I, Part I p 946, Bom Govt Gaz, 1914, Part I, p 1039
11 Reg II of 1913
12 Reg III of 1913
13 Reg I of 1895, s 3
14 Reg V of 1896
15 Burma Laws Acts XIII of 1898, s 4 (1) and Sch. I
16 Act XIV of 1872, s 5 G I 1898, Part II, 345
17 *Ibid* ss 3 and 5A. G I 1899, Part II, p 419
18 Notification No 5287, dated 30th July

p 1056
20 The Abyssinia Order in Council, G I. Part I, pp 295 320
21 The Muskat Order in Council, 1914, G. I, Part I, pp 899 915
G I,

p 119

The Code has been extended, or declared applicable, to Native States or parts thereof by notification in the *Gazette of India* or by local laws made with the sanction of the Governor-General in Council. It has been extended to—

(I) 1. The Hyderabad Assigned District (otherwise known as Berar), including the Cantonments of Akola, Amraoti and Elichpur.
2. The Civil and Military Station of Bangalore[1].
3. Rajputana, the Parganas of Jodgarh Dewiar, Saroth, Chang Kotkarana, and the Station of Abu.
4. The Hyderabad Residency Bazaars.
5. The Kathiawar Agency.[2]
6. The Surat Agency.
7. Kolhapur Civil Station.
8. Kasumpti (Keonthal).
9. Frontier tracts, Dera Ghazi Khan and Dera Ismail Khan.
10. The Baluch [illegible]
11. The Satara [illegible]
12. Part of the [illegible] near Bhamo in Upper Burmah.
13. The territories of H. H. the Maharajah of Jammu and Kashmir, for purpose of jurisdiction in certain cases.

(II) The following British Cantonments in Native States :—

1. Secunderabad, Deesa, Deolali, Bhuj, Baroda, Mhow, Nimach, Nowgong, Agar, Gunah, Sehore, Sutna, Sirdarpore.
2. The Hyderabad Contingent Stations of Aurungabad, Jalna, Hingoli, Raichur and Bolarum, Mominabad.

(III) Such parts of the following Railways as pass through Native States[3] :—

Ahmedabad-Prantij Railway.
Barsi Light Railway.
[illegible] way.
[illegible]
[illegible] Railway.
Bombay, Baroda and Central India Railway.
Cawnpore-Achnera State Railway.
Delhi-Umballa-Kalka-Railway.
Dhond-Manmad Railway.
Dhrangadhra Railway.
Godhra-Lunawada Railway.
Godhra-Rutlam-Nagda Railway.
Gondal-Porbandar Railway.
Goona-Bavan Railway.
Great Indian Peninsula Railway.
Hyderabad-Godaveri Valley Railway.
Indian Midland Railway.
Jammu and Kashmir Railway.
Jamnagar and Dwarka Railway.
Jetalsar-Rajkot Railway.
Junagarh Railway.
Kolar Gold Fields Railway.
Kolhapur Railway.
Kotri-Rohri Railway.
Madras and Southern Mahratta Railway.
Mehsana Viramgam Railway.
Morvi Railway.
Mysore State Railway.
Nizam's Guaranteed State Railway.
North-Western Railway.
Oudh and Rohilkhund State Railway.
Palanpur-Deesa Railway.
Petlad-Cambay Railway.
Rajkot-Jamnagar Railway.
Rajpipla State Railway.
Rajputana-Malwa Railway.
Sabarmati Roho Railway.
Sangli State Railway.
Southern Punjab Railway.
Tapti Valley Railway.

Amendment.—After the word 'effect' there were the words "on and from the first day of January, 1862" ; and after the word "India" there were the words "except the settlement of Prince of Wales' Island, Singapore, and Malacca". These words are omitted by the Repealing and Amending Act (XII of 1891), Sch. I.

PRACTICE.

Jurisdiction.—By the terms of the statute 24 & 25 Vic., c. 104, (now re-enaced in the Government of India Act, 1915, s. 106) the exercise of jurisdic-

[1] See *Hayes*, (1888) 12 Mad. 39, in which it was held that the Civil and Military Station of Bangalore was not British territory but a part of the Mysore State, but the Indian Criminal Law was in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879.

[2] See *Abdul Latib*, (1885) 10 Bom. 186, where it was held that the Civil Station at Rajkot was not part of British India within the meaning of Statute 21 & 22 Vic., c. 106. This case is followed in *Chhaganlal*, (1912) 14 Bom. L. R. 876, 1 Bom. Cr. C. 172, where it is held, dissenting from *Triccam Panachand v. The B. B. & C. I. Rly.*, (1885) 9 Bom. 244, that the civil station at Wadhwan is not part of British India.

[3] As to the railways passing through the territories of Native States in the Bombay Presidency, see the Bombay Government Gazette, 1924, Part I, p. 2516, where Notification No. 482-I, dated 3rd October 1924, of Government of India is reproduced. It cancels Notification of Government of India No. 782 I. B., dated 9th April 1913, with all notifications amending the same.

tion in any part of His Majesty's Indian territories by the High Courts was meant to be subject to and not exclusive of the general legislative power of the Governor General in Council An exercise of legislative authority by the Governor General in Council whereby any place or territory is removed from the jurisdiction of the High Courts is one expressly contemplated by the above statute and by the Letters Patent issued under that statute (see now s 109 of the Government of India Act 1915)[1]

As regards the jurisdiction of British Courts on railways in Native States the Courts ought to ascertain whether the jurisdiction granted relates only to offences committed on the railway or in any way connected with its administration or whether the jurisdiction is general criminal jurisdiction irrespective of the place where the offence is committed If the jurisdiction ceded is not general criminal jurisdiction then a person who has committed an offence in British territory cannot be arrested at a station on a railway line passing through a Native State[2]

Punishment of offences committed within the said territories

2 Every person[1] shall be liable to punishment under this Code and not otherwise[2] for every act or omission[3] contrary to the provisions thereof[4] of which he shall be guilty within the said territories [5]

COMMENT

This section deals with the intra territorial operation of the Code It makes the Code universal in its application to all parts of British India But in the case of certain districts[3] the local Government to which any such district is annexed may with the sanction of the Governor General in Council notify that the Code is not in force in such district

Prosecution could be instituted under the Code at any time after the offence is committed *Nullum tempus occurrit regi* (lapse of time does not bar the right of Crown)

1 **Every person'**—Every person is made liable to punishment without distinction of nation rank caste or creed provided the offence with which he is charged has been committed in some part of British India

The Law Commissioners in their address observe Your Lordship in Council will see that we have not proposed to except from the operation of this Code any of the ancient sovereign houses of India residing within the Company's territories Whether any such exception ought to be made is a question which without a more accurate knowledge than

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those families we could not venture to decide We will only beg permission most respectfully to observe that every such exception is an evil that it is an evil that any man should be above the law that it is a still greater evil that the public should be t

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binding alike on persons of different races and religions and that we greatly doubt whether any consideration except that of public faith solemnly pledged deserves to be weighed against the advantages of equal justice

1 *Burah* (1878) 4 Cal 1 2 P C

2 See *Muhammad Yusuf ud-din* (1897) 24 I A 137 *Radha Kishen* (1920) 1 Lah 406 See *Vinayak Damodar Savarkar* (1910) 13 Bom L R 296 304

3 Scheduled Districts mentioned in Act XIV of 1874

A foreigner who enters the British territories and thus accepts the protection of British laws virtually gives an assurance of his fidelity and obedience to them and submits himself to their operation. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act not being an offence in his own country[1].

Under this section every person is liable to punishment for an act which is an offence under the Penal Code; but the criminal Courts have no jurisdiction to try certain persons even if they have transgressed the provisions of the Code. Following are the recognized exceptions :—

Exceptions.—*Statutory bar to the trial of certain high dignitaries of the State.*—The Governor-General, Governors, Lieutenant-Governors, Chief Commissioners, Members of Executive Councils and Ministers are not subject to the jurisdiction of any High Court by reason of anything done by them in public capacity. They cannot be arrested or imprisoned in any suit or proceeding in any High Court and are not subject to the jurisdiction of any High Court in respect of any offence not being treason or felony[2]. Similarly the Judges of the High Courts are exempted from liability to arrest and imprisonment[3]. Offences committed by them shall be enquired of, heard, tried and determined in the Court of King's Bench in London[4]. Under several statutes public servants are protected against prosecution for acts done in pursuance thereof[5].

The following persons are always exempted from the jurisdiction of the criminal Courts of every country :—

1. *Sovereign.*—The Sovereign can do no wrong, and is, therefore, not liable to punishment. Blackstone[6] says: "No suit or action can be brought against the Sovereign even in civil matters, because no Court can have jurisdiction over him. *For all jurisdiction implies superiority of power; authority to try* would be vain and idle without an authority to redress; and the sentence of a Court would be contemptible unless that Court had power to command the execution of it: but who, says Finch, shall command the King? Hence it is, likewise, that by the law the person of the Sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the Pope, the independence of the kingdom would be no more; and if such power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power".

2. *Foreign Sovereigns.*—The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty

[1] *Esop*, (1836) 7 C. & P. 456. Ignorance of law may be considered in mitigation of punishment: *ibid.*

[2] Government of India Act, 1915 (5 & 6 Geo. V., c. 61), s. 110.

[3] *Ibid.*

[4] *Ibid*, s. 127; 11 Will. IV., c. 12; 18 Geo. III, c. 63, s. 39; 21 Geo. III., c. 70, ss. 4, 5.

[5] *Vide* s. 132 of the Criminal Procedure Code (Act V of 1898); s. 16 of the Glanders & Farcy Act (XIII of 1899); s. 24 of the Ancient Monuments Preservation Act (VII of 1904); s. 16 of the Dourine Act (V of 1910); s. 56 of the Indian Electricity Act (IX of 1910); s. 28 of the Cantonments Act (XV of 1910); s. 58 of the Indian Factories Act (XII of 1911); s. 14 of the Indian Airships Act (XVII of 1911); s. 97 of the Indian Lunacy Act (IV of 1912); s. 11 of the Defence of India (Criminal Law Amendment) Act (IV of 1915); s. 2 of the Indemnity Act (XXVII of 1919); s. 67 of the Indian Income-Tax Act (XI of 1922); s. 49 of the Indian Mines Act (IV of 1923); s. 14 of the Indian Naval Armament Act (VII of 1923).

[6] Kerr on Blackstone, Vol. I, p. 244 (4th Edn.)

confers One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him[1] The real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such juris diction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority[2]

3 *Ambassadors*—The immunity of an ambassador from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the independent Sovereign or State which sends him, and which *sends him upon the faith of his being admitted to be clothed with the same independence* of and superiority to all adverse jurisdiction as the sovereign authority who
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justice upon him, or avow himself the accomplice of his crimes But there is great dispute among the writers on the law of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it only
at are *mala in se*,
an ambassador

4 *Alien enemies*—In respect of acts of war alien enemies cannot be tried by criminal Courts "Aliens who in a hostile manner invade the Kingdom, whether their King were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law[7]" If an alien enemy commits a crime unconnected with war, e g, theft, he would be triable by ordinary criminal Courts

5 *Foreign army*—When armies or regiments of a State are by consent on the soil of a Foreign State they are exempted from the jurisdiction of the State on whose soil they are

6 *Warships*—Men of war of a State in foreign waters are exempt from the jurisdiction of the State within whose territorial jurisdiction they are Because a ship is not only part of the territory of the State to which it belongs, but it is a floating fortress representing the independence of its State

As a result of international comity foreign ships of war are exempted from local jurisdiction They enjoy this immunity because to hold otherwise would be inconsistent with the dignity, that is to say, the recognized independence of the foreign sovereign to whom they belong A public armed ship constitutes a part of the military force of her nation, acts under the immediate and direct

[1] *Schooner Exchange* v *M'Faddon*, (1812) 7 Cranch 116, 136, 137

[2] *The Parlement Belge*, (1880) 5 P D 197, *Mighell* v *Sultan of Johore*, [1894] 1 Q B 149

[3] Per Brett, L J, in *The Parlement Belge*, (1880) 5 P D 197, 207 See also the Diplomatic Privileges Act, 1708 (7 Anne, c 12)

[4] Per Lord Campbell, C J, in *Magdalena Steam Navigation Company* v *Martin*, (1859) 2 E & E 94, 111 See also *Musurus Bey* v. *Gadban*, [1894] 2 Q B 352

[5] Kerr on Blackstone, Vol I, p 224 (4th Edn) See also Phillimore's International Law, Vol II p 202 (3rd Edn)

[6] 2 Hale P C, pp 96, 99

[7] 1 Hawk P C, c 2, s 6

permitting or causing a particular act, unless it is shewn that such act was done with the master's knowledge and assent, express or implied[1].

Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing acts[2]. Similar is the case with statutes dealing with revenue matters[3].

2. *Public nuisance.*—The owner of works carried on for his profits by his agents is liable to be indicted for a public nuisance caused by acts of his agents, in carrying on the works, though done by them without his knowledge and contrary to his general orders[4]. If persons for their own advantage employ servants to conduct works, they must be answerable for what is done by the servants even though they are personally ignorant of the way in which the work is carried on and *though there is a departure in the way in which it was understood to be carried on*[5].

The Calcutta High Court has held that a principal is not criminally answerable for the acts of his agent. Where the user of premises gives rise to a nuisance, the person liable is the occupier for the time being, whoever he may be. The proprietor, if not living in the premises, might be liable for abetment. The English cases above referred to were held to be of no authority on the construction of the provisions of the Penal Code[6].

3. *Neglect of duty.*—If a person neglects the performance of an act, which is likely to cause danger to others, and entrusts it to unskilful hands he will be in certain cases criminally liable. Where an engineer employed to manage a steam-engine engaged to draw up miners from a coal pit, left the engine in the charge of an ignorant boy, who told him that he was unable to manage it, and in the absence of the engineer a man was drawn up, who was killed from the want of skill in the boy to manage the engine, it was held that the engineer was guilty of manslaughter[7]. Similarly, where a master employed a servant to use alum in loaves, the unrestrained use of that drug was noxious, and did not restrain him in the use of it, it was held that the master would be answerable if the servant used it in excess because he did not apply proper precautions against its misuse[8]. But if a skilful person is employed the employer will not be liable in the absence of express malice[9].

The liability of a proprietor of a newspaper for acts of the editor in allowing libellous matter to be published is now restricted by statute 6 & 7 Vic., c. 96, s. 7[10]. Before the passing of the statute the proprietor was considered prima facie answerable for what appeared in his paper, but this presumption arising from mere proprietorship was rebuttable[11]. If the master as well as the servant are made liable under a statute for a certain course of conduct the servant alone will be responsible for an act done in contravention of the statute[12]. But the master may be liable unless he shows good faith. Thus, the provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a forged trade-mark or false trade-description is applied, make a master criminally liable for acts done by his servants in contravention of the section[13]. It was held

[1] *Varaj Lall,* (1924) 51 Cal. 918.

[2] *Brown* v. *Foot,* (1892) 66 L. T. 649, under Sale of Food and Drugs Act, 1875. Followed in *Sew Karan* v. *Corporation of Calcutta,* (1912) 39 Cal. 682. *Collman* v. *Mills,* [1897] 1 Q. B. 396, under the Public Health Act, 1893.

[3] *Att.-Gen.* v. *Siddon,* (1830) 1 Cr. & J. 220. Where a trader harbours and conceals smuggled goods he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect smuggled goods, though the master be absent at the time, and the act is done by the servant upon the exigency of the occasion, when the goods are discovered: *ibid.*

[4] *Stephens,* (1866) L. R. 1 Q. B. 702.

[5] *Medley,* (1834) 6 C. & P. 292.

[6] *Bibhuti Bhusan Biswas* v. *Bhuban Ram,* (1918) 46 Cal. 515.

[7] *Lowe,* (1850) 3 C. & K. 123.

[8] *Dixon,* (1814) 3 M. & S. 11.

[9] *Srish Chandra Sircar,* (1918) 17 A. L. J. 343.

[10] *Holbrook,* (1878) 4 Q. B. D. 42.

[11] *Gutch Fisher,* (1829) 1 M. & Mal. 433.

[12] *Massey* v. *Morriss,* [1894] 2 Q. B. 412.

[13] *Coppen* v. *Moore,* (*No. 2*), [1898] 2 Q. B. 306.

similarly, where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge on the part of the licensed person[1]

2 **'And not otherwise'.**—These words repeal all former laws for the punishment of any offence which is made punishable by the Code On the strength of this section the Calcutta High Court has held that English common law cannot be followed to enlarge the scope of the exceptions to s 499 of the Penal Code, which should be regarded as exhaustive[2] The Law Commissioners[3] say "We do not advise the general repeal of the penal laws now existing in the Territories for which we have recommended the enactment of the Code We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court Martial) for any facts which constitute any offence defined in the Code otherwise than according to its provisions" Acts or omissions made penal by any other statute but not by the Code will be governed by that statute See s 5, *infra* as to the laws not affected by the Penal Code

3 **'Act or omission'** —See s 33, *infra*

4 **'Contrary to the provisions thereof'.**—In *Barendra Kumar Ghosh* v *King Emperor*[4] the Privy Council observed "That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code, that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects, and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though commonplaces considerations which it is important never to forget It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law" A codifying statute like the Indian Penal Code does not exclude reference to earlier case law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are open to rival constructions, but matters outside the statute cannot be invoked, not by way of construing the provisions, but of adding something to it which is not to be found within it[5]

"All penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, t be found or made in the same nactments are not to be extended w is alleged, and when the Court

was not held liable because he was not in charge of the premises

[2] *Kari Sing*, (1912) 40 Cal 433

[3] Com s 2nd Rep, ss 530 538 and (1866) 3 M H C App xi

[4] (1924) L R 52 I A 40, 55, 27 Bom L R 148, 161, 52 Cal 197

[5] *Tiruvengada Mudali* v *Tripurasundari Ammal* (1926) 51 M L J 112

[6] Per James, L J, in *Dyke* v *Elliott The 'Gauntlet'*, (1872) L R 4 P C 184 191 See also *Lord Huntingtower* v *Gardiner* (1823) 1 B & C 297, 299

intention is expressly stated, it would be more and not less wrong to assume that in introducing a Foreign law into a country the Legislature intended to introduce the whole of it unless the contrary is expressly stated[1] In the construction of codes the language of the statute and its natural meaning must be first examined uninfluenced by any consideration of the previous law on the point, and an interpretation cannot be placed on the plain language of a statute inconsistent therewith on the supposed policy of the legislature not to depart from the English law on the subject[2]

A penal statute should when its meaning is doubtful be construed in the manner most favourable to the liberties of the subjects especially so when it is of an exceptional nature[3]

The following principles as laid down in Maxwell[4] will generally govern the construction of penal laws —

The paramount duty of the judicial interpreter is to put upon the language of the Legislature honestly and faithfully its plain and rational meaning and to promote its object It is for the Legislature not the Court to define a crime and ordain its punishment *It is unquestionably a reasonable expectation that when* the former intends the infliction of suffering or an encroachment on natural liberty

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f affidavits in support

of *ex parte* applications or of magistrates convictions where the ambiguity goes to the jurisdic ion Nor does it allow the imposition of a restricted meaning on the words wherever any doubt can be suggested for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language This would be to defeat not to promote the object of the Legislature to misread the statute and misunderstand its purpose A Court is not at liberty to put limitations on general words which are not called for by the sense or the objects or the mischiefs of the enactment and no construction is

terms and within the spirit and scope of the enactment Where an enactment may entail penal consequences no violence must be done to its language in order to bring people within it but rather care must be taken that no one is brought within it who is not within its express language To determine that a case is within the intention of a statute its language must authorize the Court to say so but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions so far as to punish a crime not specified in the statute because it is of equal atrocity or of a kindred character with those which

e mischief intended

It is immaterial,

for this purpose whether the proceeding prescribed for the enforcement of the penal law be criminal or civil

1 *Kari Sing* (1912) 40 Cal 433 17 C W N 297

2 *Satish Chandra Chakravarti* v *Ram Dayal De* (19 0) 48 Cal 388

3 *Bhista b n Madanna* (1876) 1 Bom 308 311

4 On the Interpretation of Statutes (6th Edn) Ch X pp 462 467 468 477 48? 484 499 See Craies on Statute Law (3rd Edn) p 441 See also Blackstone s Commentaries on the Laws of England (4th Edn) Vol I, p (?

PRACTICE.

Jurisdiction.—Where it is doubtful whether the offence is committed in British or foreign territory, the question of jurisdiction cannot be fully determined unless the Magistrate proceeds with the investigation and states what in his opinion is proved by the evidence of the witnesses[1].

Punishment of offences committed beyond, but which by law may be tried within, the territories.

3. Any person liable, by any law passed by the Governor-General of India in Council[1], to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act[2] committed beyond the said territories in the same manner as if such act had been committed within the said territories.

COMMENT.

This section only applies to the case of a person who, at the time of committing the offence charged, was amenable to British Courts[2]. This and the following section relate to the extra-territorial operation of the Code.

1. **'By any law passed by the Governor-General of India in Council'.**—The effect of these words is apparently to restrict the operation of the section to the cases specified in the Indian Extradition Act[3] and ss. 186 and 188 of the Criminal Procedure Code. If an Indian commits an act in England which is not an offence in that country (e.g., adultery) but is punishable under the Penal Code, he may be prosecuted in India. A native Indian subject of His Majesty, being a soldier in the Indian Army, committed a murder in Cyprus while on service in such army, and was charged with this offence at Agra. It was held that he might be dealt with in respect of such offence by the criminal Court at Agra[4].

Legislative Power.—The Indian Legislature has power to make laws :—

(*a*) for all persons, for all courts, and for all places and things, within British India ; and

(*b*) for all subjects of His Majesty and servants of the Crown within other parts of India ; and

(*c*) for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and

(*d*) for the government of officers, soldiers, (airmen) and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act (or the Air Force Act) ; and

(*e*) for all persons employed or serving in or belonging to the Royal Indian Marine Service[5].

When an Act of the Government of India is outside the scope of the powers derived from an Act of Parliament, the High Court has power to declare such an enactment *ultra vires* and of no force and effect[6].

2. **'Act'.**—It includes omission as well (s. 32 *infra*).

[1] *Motee Chand* v. *Mohendronath Haldar*, (1868) 9 W. R. (Cr.) 29.

[2] *Pirtai*, (1873) 10 B. H. C. (Cr. C.) 356; *Roda*, (1889) P. R. No. 30 of 1889; *Ibrahim*, (1893) P. R. No. 7 of 1894.

[3] XV of 1903.

[4] *Sarmukh Sing*, (1879) 2 All. 218, F.B.

[5] The Government of India Act (5 & 6 Geo. V, c. 61), s. 65.

[6] *Parmeshwar Ahir*, (1918) 3 P. L. J. 537.

Extension of Code to extra territorial offences

4 The provisions of this Code apply also to any offence committed by—

(1) any Native Indian subject[1] of Her Majesty in any place without and beyond British India[2],

(2) any other British subject within the territories of any Native Prince or Chief in India,

(3) any servant of the Queen[3], whether a British subject or not, within the territories of any Native Prince or Chief in India

Explanation —In this section the word "offence" includes every act committed outside British India which, if committed in British India, would be punishable under this Code

ILLUSTRATIONS

(*a*) A, a coolie who is a Native Indian subject, commits a murder in Uganda He can be tried and convicted of murder in any place in British India in which he may be found

(*b*) B, a European British subject commits a murder in Kashmir He can be tried and convicted of murder in any place in British India in which he may be found

(*c*) C, a foreigner who is in the service of the Punjab Government commits a murder in Jhind He can be tried and convicted of murder at any place in British India in which he may be found

(*d*) D, a British subject living in Indore instigates E to commit a murder in Bombay D is guilty of abetting murder

COMMENT.

Object —The present section 4 (introduced by Act IV of 1898) shows the extent to whic'
' At the time
had only con
territorial offe
by a servant of Government, But since 1860 Parliament has conferred various extra territorial powers on the Indian Legislature We think it is right and convenient, in the case of a Code like the Indian Penal Code that the extent of its extra territorial operation should appear on the face of the Code itself "[1]

Principle —Under the first clause Native Indian subjects of His Majesty the King Emperor will be triable in British India for offences committed by them at any place out of British India Under the second clause any European British subject who commits an offence within the territories of any Native Prince or Chief in India will be triable in British India If such person commits an offence within the French or Portuguese territory in India he cannot be tried in British India Clause 3 gives jurisdiction to try servants of His Majesty, whether British or Indian, for offences committed by them in the territories of any Native Prince or Chief in India

1. 'Native Indian subject' —These words mean only native subjects *de jure* and not *de facto* Occasional residences in British territory cannot be taken to render a person who is not *de jure* a subject, a subject for the purpose of criminal jurisdiction being exercised over him for an act committed in a foreign territory,

[1] G I, (1897) Part VI, p 237

PRACTICE.

Jurisdiction.—Where it is doubtful whether the offence is committed in British or foreign territory, the question of jurisdiction cannot be fully determined unless the Magistrate proceeds with the investigation and states what in his opinion is proved by the evidence of the witnesses[1].

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3. Any person liable, by any law passed by the Governor-General of India in Council[1], to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act[2] committed beyond the said territories in the same manner as if such act had been committed within the said territories.

COMMENT.

This section only applies to the case of a person who, at the time of committing the offence charged, was amenable to British Courts[2]. This and the following section relate to the extra-territorial operation of the Code.

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Explanation —In this section the word offence includes every act committed outside British India which if committed in British India would be punishable under this Code

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(*d*) D a British subject living in Indore instigates E to commit a murder in Bombay D is guilty of abetting murder

COMMENT

Object —The present section 4 (introduced by Act IV of 1898) shows the extent to which the Code now applies to offences committed outside British India At the time the Indian Penal Code was passed that is to say in 1860 Parliament had only conferred on the Indian Legislature the power of dealing with extra territorial offences in one particular case namely where the offence was committed by a servant of Government But since 1860 Parliament has conferred various extra territorial powers on the Indian Legislature We think it is right and convenient in the case of a Code like the Indian Penal Code that the extent of its extra territorial operation should appear on the face of the Code itself [1]

Principle —Under the first clause Native Indian subjects of His Majesty the King Emperor will be triable in British India for offences committed by them at any place out of British India Under the second clause any European British subject who commits an offence within the territories of any Native Prince or Chief in India will be triable in British India If such person commits an offence within the French or Portuguese territory in India he cannot be tried in British India Clause 3 gives jurisdiction to try servants of His Majesty whether British or Indian for offences committed by them in the territories of any Native Prince or Chief in India

1 **'Native Indian subject'** —These words mean only native subjects *de jure* and not *de facto* Occasional residences in British territory cannot be taken to render a person who is not *de jure* a subject a subject for the purpose of criminal jurisdiction being exercised over him for an act committed in a foreign territory,

[1] G I (1897) Part VI p 93

an extradition offence (i e , any such offence as is described in the first schedule of the Indian Extradition Act) has been committed or is supposed to have been

District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly [1] The Political Agent is not empowered by this Act to demand the extradition of a European British subject Such a person will be dealt with under s 188 of the Code of Criminal Procedure

Such requisition must come through the Political Agent for such State if there is any

Magistrates in British India may issue warrants to arrest persons having committed offences in Native States on such information or complaint and on such evidence as would justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction and surrender them to the States within whose limits the offences are committed even without a requisition (s 10)

But the provisions of the Act shall not derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any treaty shall be followed (s 18)

(2) Where the scene of offence is some Foreign State (i e , a State to which for the time being, the Extradition Acts 1870[2] and 1873[3] apply) the fugitive criminal may, if the Government of India or the Local Government thinks fit and the offence is one of the offences mentioned in the first schedule of the Indian Extradition Act (XV of 1903) and is not of a political character, be surrendered on a requisition[4]

In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not[5]

If the Foreign State is not of the above description then there is no Act, or provision in any Act, for the giving up of a foreign subject, found in British India, who has committed a crime in that State Since the passing of the Extradition Acts 1870 to 1895[6] Great Britain has entered into Extradition treaties with various Foreign States embodying its provisions[7] Such are the Portuguese Treaty Act (IV of 1880) and the Treaty with France (1909)[8] The East Indian possessions of France are held to be not a Foreign State within the meaning of the Indian Extradition Act In a Calcutta case an accused who had taken shelter in British India after committing an offence at Chandernagore was extradited in virtue of the treaty with France of 1815[9] In the case of some foreign Asiatic States, usage, sufferance or acquiescence has given ex territorial jurisdiction to British Courts

1 A District Magistrate who is addressed with a view to execution of a warrant issued by a Political Agent of a Native State under this section must act in pursuance of such warrant and has no authority to ascertain whether a prima facie case exists against the accused or not *Giyan Chand*, (1908) P R No 3 of 1909

2 33 & 34 Vic , c 52

3 36 & 37 Vic , c 60

4 The Indian Extradition Act, s. 3 See the procedure laid down in this section

5 Per Cave J in *Re Meunier*, [1894] 2 Q B 415, 419 See also Stephens' History of the Criminal Law of England, Vol II, pp 65 70

6 58 & 59 Vic., c 33, s 2

7 See Encyclo of the Laws of England for a list of such treaties

8 Extradition (France and Tunis) Order in Council, 1909, Bom Govt Gazette, 1910, Part I, p 55

9 *Rahamat Ali*, (1919) 30 C L J 24

Cases —Where a certificate under s. 188 of the Criminal Procedure Code is granted —A Native Indian subject of His Majesty committed theft in the territory of a Native State, and was discovered in the territory of another Native State, and from there brought down or came of his own accord to Ahmedabad A certificate was granted by the Political Agent that the offence ought to be inquired into in British India It was held that the Sessions Court at Ahmedabad was competent to try the accused[1]

Where no certificate is obtained under s 188 of the Criminal Procedure Code —The accused, Native Indian subjects of His Majesty, were charged with [illegible] entrusted to them [illegible] in the Portuguese [illegible] was held that they could be tried where found under s 188 of the Criminal Procedure Code and the proviso to that section had no application as there was no Political Agent in the Portuguese territory[2] A minor girl (under sixteen years) was taken by the accused from Sholapur to Tuljapur (foreign territory), and there dedicated to the goddess Amba with intent or knowing it to be likely that she would be used for purposes of prostitution The accused was convicted of an offence under s 372 by the District Magistrate of Sholapur It was held that as the offence of the disposal of the minor took place out of British India [illegible] the offence in the absence of a certificate of [illegible] of the Local Government as required by s 18[illegible] a District Magistrate instituted criminal proceedings in British India against a Native Indian subject in respect of certain offences committed by him in French territory, without a certificate under s 188, Criminal Procedure Code, it was held that although [illegible] on, [illegible] [illegible]igh [illegible] is an absolute bar to the trial[5]

The accused enticed away a married girl, under sixteen years from the house of her father, where she was temporarily staying, in the territory of the Maharaja of Kashmir The girl was made to leave her home on a deceitful message and was subsequently persuaded to go away with the accused The accused induced her to file a petition at Gujerat, in the British territory, to the effect that she was without a guardian and was going to settle there to practise prostitution He also rented a shop for her to carry on the said profession No certificate was obtained from the Political Agent, but no objection was taken on behalf of the accused in the lower Court The former Chief Court of the Punjab held (1) that, as the girl was induced to leave her home in consequence of a deceitful message and persuaded to go away with the accused, who actually seduced her with an intent to illicit intercourse the offence committed was covered by s 366 of the Code, (2) that the objection to the defect arising from the want of a certificate was made too late and the trial of the case without a certificate was, therefore an irregularity which was cured by s 537, Criminal Procedure Code, no prejudice having been alleged or proved[6]

Subsequent annexation or transfer of the territory where the offence is committed —A person, after having committed dacoity attended with murder, absconded to Bhootan, which was subsequently annexed by the British Government It was held that he could be tried and convicted for the offence by the British Court[illegible]

[illegible] *Bapu Daldi*, (1882) 5 Mad. 23.
[5] *Ram Sundar*, (189[illegible]) 19 All 10[illegible]
[6] *Fateh Din*, (1901) P R [illegible], 4 [illegible]
[7] B See also *Mahamadbaksh F*[illegible] (1906) 8 Bom L. R. [illegible]
[1] *Roopa*, (1865) 2 W R. [illegible]

Similarly, where certain persons were charged with committing an offence at a *place in British India and committed to a Court of Session and the place where* the offence was committed became part of a Native State subsequently, it was held that the British Courts were not deprived of jurisdiction inasmuch as at the time of the transfer of the place where the offence had been committed the accused were in British India in custody, in point of law, of a Court of competent jurisdiction[1].

Breach of contract under Act XIII of 1859.—The accused, having contracted in a foreign territory to labour for the complainant in the British territory, broke his contract. He was arrested in the foreign territory, brought into the British territory and tried there. It was held that the British Court had no jurisdiction, "both the contract and the breach having taken place in foreign territory"[2]. The accused, having received an advance of money from the complainant, contracted to labour for him in a foreign territory. The accused broke the contract, for which he was prosecuted in British India. It was held that the British Court could not entertain the case[3].

Jurisdiction over Christian British subjects in Native States.—The Governor-General in Council can by order authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers, conferred or to be conferred on it by His Majesty's Letters Patent, in respect of Christian subjects of His Majesty resident within the dominions of Princes and States of India in alliance with His Majesty. In exercise of the powers thus conferred by the Indian High Courts Act, s. 3 (28 & 29 Vic., c. 15), which corresponds to s. 109, sub-s. (1), of the Government of India Act, 1915 (5 & 6 Geo. V., c. 61), the Governor-General in Council has issued the following three Notifications :—

I. In supersession of the notification of the Government of India in the Foreign Department, No. 178-J., dated the 23rd September 1874, as subsequently amended, except in so far as it relates to Berar and to the parganas of Todgarh, Dewair, Saroth, Chang and Kot Karana in Merwara, the Governor-General in Council is pleased to direct that original and appellate criminal jurisdiction over European British subjects of His Majesty, being Christians, resident within the territories, save the portions aforesaid, of the States of India named below shall, until the Governor-General in Council otherwise orders, be exercised by the High Courts of Judicature established at Fort William, Madras, Bombay and Allahabad, respectively, as follows :—

By the High Court at Fort William in—

Nepal. Sikkim.
The States in the political control of the Government of Fort William in Bengal.
The States in the political control of the Chief Commissioner of Assam.

By the High Court at Madras in—

Mysore. Banganapalle.
Pudukkottai. Sandur.
The portions of the Kalahandi State occupied by the Raipur-Vizianagram section of the Bengal Nagpur Railway.

By the High Court at Bombay in—

Baroda. Hyderabad.
The States in Central India other than those in the Baghelkhand and Bundelkhand Agencies.
The States in Rajputana, excluding the portions of the Bharatpur State occupied by the Agra-Delhi Chord Railway and by the Cawnpur-Achnera section of the Rajputana-Malwa Railway.
The States in political control of the Government of Bombay.
The Makrai State.

1 *Ram Naresh Singh*, (1911) 34 All. 118. See *Mahabir*, (1911) 33 All. 578; *Saheb Din*, (1911) 8 A. L. J. 705; *Ganga*, (1912) 34 All. 451.

2 *Siddha* v. *Biligiri*, (1884) 7 Mad. 354.

3 *Gregory* v. *Vadakasi Kangani*, (1886) 10 Mad. 21.

III. Original and appellate criminal jurisdiction over European British subjects of His Majesty shall be exercised by the High Courts of Judicature established at Madras, Bombay and Allahabad, respectively, as herein provided, that is to say,

(1) *By the High Court of Judicature at Madras in—*

Coorg.

(2) *By the High Court of Judicature at Bombay*[1] *in—*

The Paragana of Manpur in Central India.

(3) *By the High Court of Judicature at Allahabad in—*

Ajmer-Merwara[2].

Appeal from criminal jurisdiction exercised by Political Agents.—The Revenue Commissioner shall exercise the jurisdiction of a High Court, as described in the Code of Criminal Procedure, in respect of offences over which the jurisdiction of a Court of Session is exercised by the Political Agent, subject to the following limitations :—

(*a*) In the case of every appeal by a person convicted of an offence punishable with death or by a co-accused of such convict, the said jurisdiction shall be exercised by the Governor in Council ;

(*b*) In every case decided by the Commissioner the Governor-in-Council reserves jurisdiction to call for the record and pass orders as he thinks fit[3].

Acts done within British as well as foreign territory.—A person who is a British subject is liable to be tried by the Courts of this country for acts done by him, partly within and partly without the British territories, provided the acts amount together to an offence under the Code[4].

(B) **High Seas—Admiralty Jurisdiction.**—The jurisdiction to try offences committed on the high seas is known as admiralty jurisdiction. It is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. It extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go[5]. It makes no difference whether the ship is made fast to the bottom of the river by anchor and cable, or to its side by ropes from the quay[6]. The admiralty jurisdiction extends over British ships although they may be at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. Ever since the time of Richard II., this jurisdiction has extended to where great ships go as part of their voyage for the purposes of trading, and to all persons, whether British subjects or foreigners, who happen to be on board such ships, so as to be entitled to the protection of English law[7]. It makes no difference whether the offender comes voluntarily on board the British ship or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular Court by which he is tried, or is brought within that jurisdiction against his will[8]. If the ship is a British ship and sailing under the British flag the Court will have jurisdiction, and no proof of the register of the

[1] In *Emp.* v. *Price*, Cr. Rev. No. 257 of 1910, decided on 6th October 1910, the Bombay High Court enhanced sentence on an application by the Administration of the Central Provinces.

[2] Notification No. F. 593-23, dated September 1, 1923 (G. I. Part I, September 1, 1923, p. 1114), cancelling the notification No. 457, dated April 21, 1913, G. I., Part I, p. 424.

[3] Notification No. 2567, dated 7th June 1905, Bom. Govt. Gazette, 1905, Part I, p. 671.

[4] *Moulvie Ahmudoolah*, (1865) 2 W. R. (Cr.) 60.

[5] *Anderson*, (1868) L. R. 1 C. C. R. 161.

[6] *Ibid.*

[7] *Anderson*, (1868) L. R. 1 C. C. R. 161; *Carr and Wilson*, (1882) 10 Q. B. D. 76, 86; *Lesley*, (1860) 29 L. J. (M. C.) 97.

[8] *Benito Lopez, Christian Sattler*, (1858) 7 Cox 431.

vessel is necessary[1] It is sufficient to show orally that she belongs to British owners and carries the British flag[2] If a ship is registered as a British ship and sailing under the British flag but the owner is not a natural born British subject the admiralty jurisdiction will not extend to offences committed on board such ship[3] If the owner is a British subject the jurisdiction will extend to all offences committed thereon whether the offenders be British subjects or foreigners If [illegible] foreign vessel on the high [illegible] lands in England and dies [illegible]

As to the limits of the admiralty jurisdiction East in his treatise on the Pleas of the Crown[5] says that this jurisdiction does not extend to any river creek, or port within the body of a county The only difficulty which ever occurs is with respect to what shall be considered as the line of demarcation between the county and the high sea Upon the open sea shore it is past dispute that the common law and the admiralty have alternate jurisdiction between high and low water mark But in harbours or below the bridges in great rivers near the sea which are partly inclosed by the land the question is often more a matter of fact than of law and determinable by local evidence There are however some general rules laid down upon this point, which it would be improper altogether to omit It is plain that the admiral can have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties though within the flux and reflux of the tide except in the particular instances before shewn of mayhem and homicide done in great rivers beneath the bridges near the sea which depend on the stat 15 Ric 2 c 3 In general it is said that such parts of the rivers arms or creeks are deemed to be within the bodies of counties *where persons can see from one side to the other* Ld Hale, in his treatise De Jure Maris says That arm or branch of the sea which lies within the *fauces terrae*, where a man may *reasonably* discern between shore and shore is, or at least may be within the body of a county Hawkins however, considers the line more accurately confined by other authorities to such parts of the sea where a man standing on the side of the land *may see what is done on the other* When the haven, creek or river is within the body of a county the common law tribunals have a concurrent jurisdiction in case of murder[6]

With regard to the sea shore the ordinary criminal Courts and the Court of Admiralty have concurrent jurisdiction between high and lower water mark[7]

Cases—The accused an English sailor stole three chests of tea out of a British vessel when it was lying in a river in China It was urged that as the vessel was twenty or thirty miles from the sea the offence was not committed on the high seas It was held that the offence was committed within the Admiralty juris

was rightly tried and convicted at the Central Criminal Court[9] A foreigner having committed larceny in England, was followed to Hamburgh by an English police officer, who arrested him without a warrant and brought him against his will on board an English steamer trading between Hamburgh and London, and there kept him in custody in order that he might be tried for the larceny in England

1 *Sieveking* (1870) L. R 1 C C. R 264 Merchant Shipping Act (57 & 58 Vic c 60) 1894 s 106
2 *Frank Allen* (1866) 10 Cox 405
3 *Bjornsen* (1865) 10 Cox 74
4 *John Lewis* (1857) 26 L. J (M C) 104
5 Vol II pp 803 804
6 *John Bruce* (1812) R & R 243 2 Leach 1093
7 3 Coke 113
8 *Thomas Allen* (1837) 1 Mood. C C 494
9 *Anderson* (1868) L R 1 C C R 161

Admiralty Act, 1890[1] The abovementioned Courts are therefore empowered to exercise the same jurisdiction as is vested in the Admiralty Court of England

Offences committed on the high seas could not be tried, at first, by ordinary criminal Courts They were only dealt with by the Admiralty Court But now by virtue of the Admiralty Offences Act, 1849 (12 & 13 Vic, c 96) and the Merchant Shipping Act, 1894 (57 & 58 [illegible] as in India by ordinary crimin[illegible] jurisdiction of those Courts [illegible]

[illegible]

had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed (2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849' (12 & 13 Vic, c 96) For the purpose of giving jurisdiction under the Merchant Shipping Act every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be (s 684) Where any district within which any court, justice of the peace, or other magistrate, has jurisdiction either under this Act or under any other Act or at common law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel lake, river, or other navigable water, every such court, justice, or magistrate [illegible]

[illegible]

diction It says "All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England, and the cost and expenses of the prosecution of any such offence may be directed to be paid as in the case of cost and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England"

By ss 1 and 56 of 9 Geo IV, c 74, a special jurisdiction was conferred on the Supreme Courts and it has now passed to the High Courts These provisions have not been repealed

Presidency Magistrates' jurisdiction in admiralty cases—The Bombay High Court has held that the Presidency Magistrate has authority to convict a person of an offence under the Penal Code it having been committed in a British ship during her voyage on the high seas The Chief Officer of a ship was charged with criminal breach of trust as a servant with respect to the passage money he received from a pilgrim during the voyage It was held that the Presidency Magis-

[1] 53 & 54 Vic, c 27

trate could try him, and that the charge should be framed in reference to the Penal Code, and that in case of conviction the punishment should be awarded under that Code[1]. The Calcutta High Court has dissented from this view. It has held that the High Court of Calcutta has jurisdiction, in its Original Criminal Side, under ss. 684 and 686 of the Merchant Shipping Act (57 & 58 Vic., c. 60), to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage. The offence should be tried, and the charge framed, under the English law, but the procedure at the trial and the sentence must be regulated by the law of India[2].

Jurisdiction of mofussil Courts.—The jurisdiction to try offences committed on the high seas was first conferred on the mofussil Courts by s. 1 of 23 & 24 Vic., c. 88, which extended the provisions of the Admiralty Offences Act, 1849 (12 & 13 Vic., c. 96) to British India.

Section 1 of the Admiralty Offences Act provides: "If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place shall be brought for trial to any colony, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for an auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of criminal justice of such colony."

Section 3 provides: "Where any person shall die in any colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in such colony in the same manner in all respects as if such offence had been wholly committed in that colony; and that if any person in any colony shall be charged with any such offence as aforesaid in respect of the death of any person who having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea".

Both these sections are extended to India by s. 1 of 23 & 24 Vic., c. 88, which says that "the word 'colony' shall include and apply to every part and place heretofore under the Government of the East India Company, or which may

[1] *Chief Officer of SS. Mushtari,* (1901) 3 Bom. L. R. 253, 25 Bom. 636.

[2] *Salimullah,* (1912) 39 Cal. 487.

be under the Government of Her Majesty in India, and all the provisions of this said Act shall be construed and take effect accordingly" Section 686 of the Merchant Shipping Act makes the provisions of s 1 of 12 & 13 Vic c 96 applicable to India[1]

Section 2 of 23 & 24 Vic , c 88, gives the offender the right of being tried by the High Court It provides 'That where any person within any place in India is charged with the commission of any offence in respect of which jurisdiction is given by the said Act (12 & 13 Vic , c 96), or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in India, if at any time before his trial he make it appear to the Court exercising criminal jurisdiction in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place he could have been tried only in the Supreme Court of one of the three Presidencies in India, and claimed to be tried by such a Supreme Court accordingly, the said Court exercising criminal jurisdiction as aforesaid shall certify the fact and claim to the Governor of such place or chief Local Authority thereof, and such Governor or chief Local Authority thereupon shall order and cause the person charged to be sent in custody to such one of the Presidencies as such Governor shall think fit for trial before the Supreme Court of such Presidency and the said Supreme Court and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed or originally charged to have been committed within the limits of the ordinary jurisdiction of such Supreme Court'

Where a murder was committed on board a British steamer from Penang to Negapatam by a British subject, the Sessions Court of East Tanjore at Negapatam was held to have jurisdiction to try the offence[2]

Law and procedure applicable to offences committed on the high seas —Under the provisions of 12 & 13 Vic , c 96 extended to India by 23 & 24 Vic , c 88, persons charged with crimes on the high seas were proceeded against in the Courts of British India in the same way as if the offence had been committed upon any waters situate within the limits of British India and within the limits of the local jurisdiction of its criminal Courts, and on conviction were punished as if their crimes had been committed in England The English law was held to be the substantive law of decision in cases made cognizable by the local tribunals by virtue of that statute[3] The Bombay High Court is of opinion that this is altered by the Colonial Courts Act (37 & 38 [illegible] high seas should be tried and pun [illegible] case the former Chief Court of L [illegible] Calcutta High Court has differed from the Bombay cases and held that the Colonial Courts Act has made no such alteration and such offence should be tried and the charge framed, under the English law, whether the accused is a British European subject or a British Indian subject, but the procedure at the trial and the sentence must be regulated by the law of India[6] Section 3 of the Colonial Courts Act (37 & 38 Vic c 27) says "When, by virtue of any Act of Parliament now or hereafter to be passed a person is tried in a Court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such Court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him

1 *Sengodai Kannan*, (1927) 53 M L J 101, 37 M L T 361

2 *Ibid*

3 *Elmstone* (1870) 7 B H C (Cr C) 89, *Thompson* (1867) 1 Beng L R (O Cr J) 1

4 *Sheik Abdool Rahiman* (1889) 14 Bom 227, *The Chief Officer of SS Mushtari*, (1901) 3 Bom L R 203 25 Bom 636

5 *Po Thaung* (1910) 5 L B R 221, F B.

6 *Salimullah*, (1912) 39 Cal 487

9. It follows from what has been said that it is the duty of every Court, dealing with an accusation of an act alleged to be an offence and to have been committed in a place near the limits of British territory, to inquire and ascertain and record a clear finding as to whether it has been committed within or beyond those limits.

10. It is also the duty of every Court, dealing with an act alleged or found to have been committed beyond the limits of British India, to inquire and ascertain and record a clear finding as to whether the accused is or is not a British subject, and if he is, whether an Indian or a European British subject. In every formal charge of an offence alleged to have been committed beyond the limits of British India, it should be explicitly stated either that the accused is not a British subject, or that he is a British subject, Indian or European, as the case may be.

11. It seems expedient to add (1) that a Magistrate is not at liberty to shirk an inquiry into the nationality of an accused person merely because it may appear to him a question of nicety or difficulty; and (2) that a Magistrate is not competent to dispense with enforcement of the law and absolve a British subject from the penal consequences of an offence, *prima facie* established against him, merely because the offence was not committed within the limits of British India. Both these mistakes were found to have been committed in P. R. No. 9 (Cr.) (1893).

12. In cases in which a question of nationality arises the rulings[1] of the Chief Court may be consulted.

13. The term 'Political Agent' is defined in s. 3 (40) of the General Clauses Act, X of 1897, and a list of the political Agents for the smaller States having political relations with the Punjab Government is given in Part VI of Chapter XXIII, Vol. III. The Resident in Kashmir is the Political Agent for the Kashmir State[2].

Charge.—When a person is tried before a Court which would not have jurisdiction but for special circumstances, the Court should specify in the charge those circumstances.

The charge should run thus:—

I (*name and office of Magistrate*) hereby charge you——as follows—

That you, being a Native Indian subject (*or* British subject *or* servant) of His Majesty, the King-Emperor, on or about the—day of, at —, without and beyond British India, did—and thereby committed an offence punishable under ss. 4 and—of the Indian Penal Code, and within my cognizance (*or*—the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

If the accused is a British subject or servant of the King-Emperor and has committed an offence within the dominions of a Native Prince, the second paragraph in the above charge would run thus:—

That you, being a British subject (*or* a servant) of His Majesty the King-Emperor, on or about the—day of—, at—, within the dominions of—did, etc.

If the offence comes under the admiralty jurisdiction, the second paragraph of the above charge would generally be as follows:—

That you, on or about the—day of—, then being a British subject (*omit these words if the accused is a foreigner*) on board the British ship—, on the High Seas, did—, and thereby committed an offence punishable, etc.

1 *Fakir*, (1883) P. R. No. 22 of 1883; *Fakir*, (1884) P. R. No. 1 of 1885; *Fazal Ali*, (1893) P. R. No. 9 of 1893.

2 L. H. C. R. & O., Vol. II, Ch. V, p. 40.

Certain laws not to be affected by this Act

5 Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions of the Statute 3 & 4 William IV, Chapter 85, or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said territories or the inhabitants thereof, or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers or airmen[1], in the service of Her Majesty , or of any special or local law[2]

COMMENT

This section acts as a saving clause to s 2 Though the Code was intended to be a general one, it was not thought desirable to make it exhaustive and hence offences defined by local and special laws were left out of the Code and merely declared to be punishable as theretofore [1] 'Section 2 repealed all existing Penal enactments in force on the date from which the Code was to come into operation Then the effect of s 5 was to qualify this general repeal and to declare that notwithstanding it, offences defined by special and local laws should continue to be punishable as theretofore If therefore a person were required to ascertain from the Penal Code what acts and omissions are punishable in British India as offences he would properly answer that it appeared from Section 2 and Section 5 that all acts or omissions contrary to the provisions of the Code itself or the provisions of special and local laws and some other laws enumerated in Section 5 and these alone and none others were punishable as offences [2] The preamble to the Code and ss 1 and 2 read with this section prescribe that all acts or omissions contrary to the provisions of the Code or of special and local laws enumerated in this section and none others are punishable as offences[3]

Statute 3 & 4 William IV Chapter 85 was the Government of India Act 1833 which has now been repealed in part

1 **'Officers, soldiers or airmen'** —The laws relating to Army and Navy here referred to are the several Acts and Articles of War passed from time to time to punish offences committed by military and naval men The Code does not affect their provisions See the Army Act (44 & 45 Vic c 58) and the Air Force Act (7 & 8 Geo V, c 51) as continued and amended by subsequent Annual Army and Air Force Acts which provide a special procedure for the trial of offenders by a court-martial and which gives a list of persons subject to military law and the Indian Army Act (VIII of 1911)

2 **'Special or local law'** —No special or local law (ss 41 and 42) is repealed varied, suspended, or affected by the enactment of the Code Although an offence is expressly made punishable by a special or local law yet it will be punishable under the Penal Code if the facts come within the definitions of the Code[4] [illegible] offence with a particular penalty [illegible] offence by including new acts [illegible] former case the new offence is punishable by the new penalty only, in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included

[1] (1866) 3 M H C App 11 16 17

[2] *Ibid* p 17

[3] *Satish Chandra Chakravarti* v *Ram Doyal De* (1920) 48 Cal 388

[4] *Ramachandrappa* (1883) 6 Mad 249 *Sadasiva Pillai* (186) 1 Weir 26 *Bayne* (1906) 8 Bom L R 414 A police constable punished departmentally under the Police Act [illegible] of Das J, in *Abdul Hamid* (1922) 2 Pat 134, at p 151

The principle is that where a new offence is created and the particular manner in which proceedings should be taken is laid down, then proceedings cannot be taken in any other way[1]. No prosecution under the Code is admissible, if it appears upon the whole frame of the special Act that it was intended to be *complete in itself*, and to be enforced only by the penalties created by it[2]; but in the absence of anything in the special Act to exclude the operation of the Code, an intention on the part of the legislature to exclude it should not be inferred[3]. However, a person cannot be punished under both the Penal Code and a special law for the same offence[4], and it is ordinarily desirable that the sentence should be passed under the special Act[5]. For, it is presumed that the legislature intends that the special form of punishment is appropriate to special cases. The General Clauses Act[6] provides that "where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence". Where the accused is guilty of a specific offence under the Indian Penal Code he should be convicted under the Code if the punishment under the special Act is not adequate[7]. The Allahabad High Court has held that a conviction of theft under s. 379 of the Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under s. 9 of the Indian Opium Act, 1878[8].

Punishment for contempt under common law.—This section does not affect the common law principles introduced into the Presidency towns when the late Supreme Courts were established. The High Courts in the Presidencies have power to punish the offence of contempt on a summary proceeding in relation to proceedings before them not by virtue of the Penal Code but by virtue of the common law of England[9]. The Rangoon High Court has held that the High Court has power to deal with contempts summarily, instead of acting under s. 476 or 480 of the Code of Criminal Procedure or under O. XVI, r. 17, of the Code of Civil Procedure[10]. The Court has power to punish, by commitment for contempt, a libel published while the Court is not sitting[11].

The Calcutta High Court has held that it has no jurisdiction to commit a person for contempt of a criminal Court in the mofussil[12]. The Bombay High Court[13] and the Allahabad High Court[14] are of opinion that the High Court has such

1 Per Wild, J., in *Bhalchandra Ranadive*, (1929) Crim. Rev. No. 250 of 1929, decided on August 5, 1929.

2 *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131, 139; *Anon.*, (1876) 1 Mad. 55.

3 *Imam Bakhsh*, (1884) P. R. No. 10 of 1885; *Segu Baliah* v. *N. Ramasamiah*, (1917) 6 L. W. 283.

4 *Hussun Ali*, (1873) 5 N. W. P. 49; *Sukhnandan Rai*, (1917) 19 Cr. L. J. 157.

5 *Kuloda Prosad Majumdar*, (1906) 11 C. W. N. 100, 5 C. L. J. 47; *Rup Deb*, (1913) 11 A. L. J. 340.

6 X of 1897, s. 26; the Bombay General Clauses Act (Bom. I of 1904), s. 27; the Police Act (V of 1861), s. 36; the Bombay City Police Act (Bom. IV of 1902), s. 131; the Bombay District Police Act (Bom. IV of 1890), s. 74. See the Interpretation Act (52 & 53 Vic. c. 63), s. 33.

7 *Futteh Khan*, (1874) P. R. No. 11 of 1874.

8 *Deoki Koeri*, (1926) 48 All. 496.

9 *Legal Remembrancer* v. *Matilal Ghose*, (1913) 41 Cal. 173; *Surendra Nath Banerjee* v. *High Court Judges*, (1883) 10 Cal. 109, P. C.; *Moti Lal Ghose*, (1917) 45 Cal. 169; *Bason* v. *Skone*, (1925) 43 C. L. J. 41; *M. K. Gandhi*, (1920) 22 Bom. L. R. 368; *Satyabodha Ramchandra*, (1922) 24 Bom. L. R. 928, 6 Bom. Cr. C. 252, 47 Bom. 76; *Marmaduke Pickthall*, (1922) 25 Bom. L. R. 15, 7 Bom. Cr. C. 1; *Marmaduke Pickthall (No. 2)* (1922) 25 Bom. L. R. 107, 7 Bom. Cr. C. 43, 46 Bom. 533; *Purshottam* v. *Navnitlal*, (1925) 28 Bom. L. R. 148, 50 Bom. 275; *Ponnuswami Iyer* v. *Ganapathi Iyer*, (1923) 45 M. L. J. 742; *Sayyad Habib*, (1925) 6 Lah. 528; *In re D. S. Bukhari*, (1927) 29 P. L. R. 294, 9 L. L. J. 455, F. B.; *Murli Manohar Prasad*, (1928) 8 Pat. 323, F.B.

10 *Ebrahim Mamoojee*, (1926) 4 Ran. 257.

11 *William Tayler*, (1869) 26 C. L. J. 345; *In re Banks*, (1896) 26 C. L. J. 401.

12 *In re the Amrita Bazar Patrika*, (1913) 17 C. W. N. 1253, 1282.

13 *Balkrishna Govind Kulkarni*, (1921) 24 Bom. L.R. 16, 6 Bom. Cr.C. 130, 46 Bom. 592.

14 *In re Abdul Hasan Jauhar*, (1926) 48 All. 711; *In re An Advocate*, (1928) 29 Cr. L. J. 801; *Ganesh Shankar Vidyarthi*, (1928) 26 A. L. J. 1307, F. B.

power The latter view has been adopted in the Contempt of Courts Act, 1926 s 2

All other Courts including the Judicial Commissioners' Courts can only take action for contempt of Court under s 228 of the Penal Code and ss 477 and 487 of the Code of Criminal Procedure[1]

Amendment —After the words "Her Majesty' were the words "or of the East India Company, or of any Act for the Government of the East India Company' but they were repealed by Act XIV of 1870 The words ' or airmen" were introduced by Act X of 1927

PRACTICE

Jurisdiction.—Section 101 of the Mutiny Act (41 Vic , c 10) does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts nor render the exercise of their jurisdiction dependent upon the sanction of the Commander in Chief[2]

Conviction under a special Act not to be quashed —The circumstance that the act proved would also constitute an offence under a section of the Code, is no reason for quashing a conviction under a special law[3]

1 *Venkatrao Rajerao* (1922) 24 Bom L R. 386 6 Bom Cr C 186, 46 Bom 973

2 *Maguire* (1879) 5 Cal 124

3 *Kassimuddin* (1867) 8 W R (Cr) 55

CHAPTER II.

GENERAL EXPLANATIONS.

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained, and the meanings thus announced are steadily adhered to throughout the subsequent chapters. Sir James Stephen suggests that the object of this Chapter is to prevent captious Judges from wilfully misunderstanding the Code and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this Chapter to see what the meaning of the Code is[1].

Definitions in the Code to be understood subject to exceptions.

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision or illustration.

ILLUSTRATIONS.

(*a*) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) A, a Police-officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

COMMENT.

The proper place for this section would be Chapter IV as it refers to exceptions mentioned in that Chapter.

Illustrations are very useful so far as they serve to explain the meaning of the section. But it has been decided that they ought never to be allowed to control the plain meaning of the section itself, when the effect would be to curtail a right which the section in its ordinary sense would confer[2].

Illustration (*a*) is based on s. 82, *infra*, and (*b*) on s. 76, *infra*.

Sense of expression once explained.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

COMMENT.

The maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (the mention of one is the exclusion of another) is the basis of this section. "To say that it shall have

1 P. L. C. (1860), p. 1261.

2 *Koylash Chunder Ghose* v. *Sonatun Chung Barooie*, (1881) 7 Cal. 132.

a particular meaning everywhere, is to say that it shall have no other meaning anywhere If the words taken grammatically have a definite, certain and unequivocal meaning, if they constitute grammatically a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed If, however, the expression does not include the complete thought of the legislature, or if the words are equally susceptible of several meanings, we are to seek in other parts of the same statute or in other statutes certainly in those in pari materia with this, the one of the several possible meanings which ought to be put upon the words"1.

Gender

8 The pronoun "he" and its derivatives are used of any person, whether male or female

Number

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number

COMMENT

The General Clauses Act similarly says that unless there is anything repugnant in the subject or context words in the singular shall include the plural and *vice versa*[2]

'Man" 'Woman"

10 The word "man" denotes a male human being of any age the word "woman" denotes a female human being of any age

COMMENT

The word 'man', in a scientific treatise on zoology or fossil organic remains, would include men, women, and children as constituting the highest order of vertebrate animals It is also used in an abstract and general sense in philosophical or religious disquisitions But, in almost every other connection, the word 'man' is used in contradistinction to 'woman' This restricted sense is its ordinary and popular sense[3]

'Person

11 The word "person" includes any Company or Association, or body of persons, whether incorporated[1] or not

COMMENT

The word 'person' includes both a natural person (a human being) and an ...ficial person (a corporation)[4] It is, however, used frequently in the Code ... sense in which it is clear from the context that corporate bodies, etc , are not ...uded[5]

The General Clauses Act[6] says that "person" shall include any company or ...iation or body of individuals, whether incorporated or not But a limited

...er Holloway, J , in (1866) 3 M. H C. ...11, 12
...t X of 1897, s. 13
...r Byles J , in *Chorlton v Lings*, (1868) ... C. P 374, 392.
... *Pharmaceutical Society v London ...rovincial Supply Association* (1880) 5 App. Cas. 857
[5] See ss. 56, 73, 84 87, 100, 105, 114, 137, 139, 141, 149 151, 153, 157, 159, 170, 191, 216, 220-225, 278, 282, 295, 297, 492, 497 and Ch. XVI
[6] Act X of 1897, s. 3 (39).

liability company cannot be committed for trial on an indictment[1]. But persons who abet or aid the company would be liable[2].

The word 'person' is sufficiently wide to include the Government as representative of the whole community[3]. Thus, possession of wood by a Forest Inspector, a servant of Government, is held to be possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft if that consent was unauthorized or fraudulent[4].

1. **'Incorporated'.**—Incorporation is the formation of a legal body, with the quality of perpetual existence and succession, except as limited by the Royal Charter or Act of Parliament effecting the incorporation[5].

"Public." **12.** The word "public" includes any class of the public or any community.

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

"Queen."

COMMENT.

Section 13-A of the General Clause Act[6] provides that in all Acts of the Governor-General in Council, references to the Sovereign or to the Crown shall, unless a different intention appears, be construed as references to the Sovereign for the time being.

14. The words "servant of the Queen" denote all officers or servants continued, appointed or employed in India by or under the authority of the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the better Government of India"[1], or by or under the authority of the Government of India or any Government[2].

"Servant of the Queen."

COMMENT.

Statute 21 & 22 Vic., c. 106, is repealed by the Government of India Act, 1915 (5 & 6 Geo. V., c. 61).

1. **'Government of India'.**—See s. 16, *infra.*

2. **'Government'.**—See s. 17, *infra.*

15. The words "British India" denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the better Government of India"....

"British India."

COMMENT.

Statute 21 & 22 Vic., c. 106, is repealed by the Government of India Act, 1915 (5 & 6 Geo. V., c. 61). See s. 1 of the Government of India Act.

This definition is the same as that in the General Clauses Act of 1868. The definition of 'British India', as given in the General Clauses Act of 1897, is much wider. According to this Act 'British India' "shall mean all territories and places

1 *Daily Mirror Newspaper, Ltd.,* [1922] 2 K. B. 530.
2 *Ibid.*
3 *Hanmanta,* (1877) 1 Bom. 610, 622.
4 *Ibid.*
5 Wharton, 13th Ed., p. 434.
6 Act X of 1897.

within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India'[1] But this definition will not affect the meaning to be given to the term 'British India' in Acts amending the Penal Code subsequent to 1897 in view of s 7 of the Penal Code

Amendment.—This section ended with the clause "except Settlement of the Prince of Wales' Island, Singapore and Malacca", but that clause was repealed by Act XII of 1891, Sch I

'Government of India'

16. The words "Government of India" denote the Governor General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor General of India alone, as regards the powers which may be lawfully exercised by them or him respectively

COMMENT.

The General Clauses Act[2] similarly defines this term The definition here indicates the high officers whose duty it is to carry on the Government of India

"Government"

17. The word "Government" denotes the person or persons authorized by law to administer executive Government in any part of British India

COMMENT.

According to this definition 'Government' means the local Government of a province A Collector acting in the management of a Khas Mehal, the property of Government, is as much the Government within the meaning of this section as when he is exercising any other of the duties of his official position[3] The General Clauses Act[4], however, says that 'Government' or 'the Government' shall include the local Government as well as the Government of India, and Local Government' shall mean the person authorized by law to administer executive government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner[5]

Act III of 1895 has varied the definition of 'Government' so far as ss 255 to 263 A are concerned Section 263 A defines what 'government' means in those sections

Presidency"

18 The word "Presidency" denotes the territories subject to the Government of a Presidency.

COMMENT

The General Clauses Act[6] defines "Presidency town" The part of India under the East India Company was divided into three Presidencies Bengal, Madras and Bombay The Presidency of Bengal was done away with in 1854, though it has been revived in 1912 Calcutta is a Presidency town under the General Clauses Act

'Judge'

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person

1 X of 1897, s 3 (7)
2 *Ibid*, s 3 (22)
3 *Bajoo Singh*, (1898) 26 Cal 158
4 X of 1897 s 3, (21)
5 *Ibid*, s 3 (29)
6 *Ibid*, s 3 (41)

who is empowered by law to give, in any legal proceeding[1], civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

ILLUSTRATIONS.

(a) A Collector exercising jurisdiction in a suit under Act X of 1859[2], is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code[3], to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

COMMENT.

The illustrations show that a person other than one who is officially designated as a Judge and who is empowered to give a definite judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge but he is not a Judge when he has not the seisin of the case in which he can give a definite judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of "judge" when it is empowered by law to give a judgment, such as arbitrators[1].

1. **'Legal proceeding'.**—This means a proceeding regulated or prescribed by law, in which a judicial decision may or must be given[2]. Thus a president of a Union Board is not a Judge because he does not give his judgment in a legal proceeding[3].

Magistrate—A Magistrate is a "judge" within the meaning of this section, read with s. 4 (2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before a Magistrate cannot be used in the High Court[4].

Arbitrators.—Arbitrators empowered by law to give a definitive judgment are included in the term 'Judge'[5]. They can come within the term "judge" only when dealing with a case on reference to their arbitration.

2. **'Act X of 1859'.**—This Act has been repealed in the Chota-Nagpur Division of Bengal (except as to the District of Manbhum and the Tributary Mahals) by Ben. Act I of 1879, and in the rest of Bengal (except as to Calcutta, Orissa and the Scheduled Districts) by the Bengal Tenancy Act (VIII of 1885). It is now in force in the district of Manbhum, in the Darjeeling District and in part of the Jalpaiguri District in Bengal, and such parts of it as are not inconsistent with the portions of Act VIII of 1885 which have been extended to the Orissa Division are in force in that Division.

'Act X of 1859' has also been repealed in the Province of Agra (except as to certain Scheduled Districts) by the United Provinces Rent Act (XVIII of 1873), and in the Central Provinces by the Central Provinces Tenancy Act (IX of

1 *Ramchandra Modak,* (1925) 5 Pat. 110, 115.

2 *Kanniappa Chettiar,* (1928) 30 Cr. L. J. 365.

3 *Ibid.*

4 *Ramchandra Modak,* sup.

5 First Rep., s. 76.

1883) In the province of Agra read now 'the United Provinces Tenancy Act (II of 1901) for 'Act X of 1859'

3 **'Regulation VII, 1816, of the Madras Code'** —This has been repealed by the Madras Civil Courts Act (III of 1873)

20 The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially

Court of Justice

ILLUSTRATION

A panchayat acting under Regulation VII, 1816[1] of the Madras Code having power to try and determine suits is a Court of Justice

COMMENT

"Court of Justice' does not mean here the place or building where justice is administered but the judge or judges who conduct judicial proceedings in the due administration of justice When the judges are transacting merely administrative business they are not a Court of Justice[1]

1. **'Reg. VII, 1816'** —See Comment on s 19, *sup*

21 The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely —

'Public servant

First —Every Covenanted servant of the Queen,

Second —Every Commissioned Officer in the Military Naval or Air Forces of the Queen while serving under the Government of India or any Government,

Third —Every Judge,

Fourth —Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process or to administer any oath or to interpret, or to preserve *order in the Court, and every person specially authorized* by a Court of Justice to perform any of such duties,

Fifth —Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant,

Sixth —Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority,

Seventh —Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement,

1 *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 Q B 431

Eighth.—Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

ILLUSTRATION.

A Municipal Commissioner is a public servant.

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

COMMENT.

A line is drawn between the great mass of the community and certain classes of persons in the service and pay of Government, or exercising various public functions, who are here included in the words "public servant". Those offences which are common between public servants and other members of the community are left to the general provisions of the Code. But there are several

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The following are held to be statutory public servants.—A Municipal Inspector within the meaning of Madras District Municipal Act (s. 41)[1]; a Sanitary Inspector within the meaning of the Madras Local Boards Act (s. 43)[2]; a Karkun employed to execute revenue processes and receive rent by a manager appointed under Act XV of 1872[3].

The following are held to be not statutory public servants.—A police-officer under suspension within the meaning of s. 8 of Act V of 1861[4]; a Municipal Corporation within the meaning of s. 39 of Act V of 1877[5]; a person nominated by a Collector under s. 69 of the Bengal Tenancy Act[6]; a Goods Clerk of a railway company for the purpose of Chapter IX of the Penal Code[7]; a person assisting, in virtue of s. 11 of the Burma Village Act, the headman of a village in arresting a person[8].

Not public servants.—A lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself[9]; a Poddar of the Bank of Bengal[10]; a Mysore Policeman[11]; a peon employed by the manager of an estate under the charge of the Court of Wards[12]; a carter employed by Government[13]; an arbitrator appointed by the parties to a proceeding under s. 145 of the Criminal Procedure Code[14]; a clerk appointed by a Sub-Registrar and paid out of an allowance given to the latter[15]; a Municipal Water-Tax Collector[16]; an unpaid apprentice of Government[17]; a villager required to bring an accused person into a police-station in arrest under s. 11 of the Burma Village Act[18]; and a village chowkidar[19].

PRACTICE.

Evidence.—Where the offence concerns any 'public servant' it is sufficient to show "actual possession of the situation", and this is sufficiently shewn by the proof that the duties or functions are actually discharged by the person alleged to be such servant.

"Moveable property."

22. The words "moveable property" are intended to include corporeal property[1] of every description, except land and things attached to the earth[2] or permanently fastened to anything which is attached to the earth.

Movers Act (Punj. Act II of 1902), s. 12 (3); the Punjab Military Transport, etc., Act (Punj. Act I of 1903), s. 4 (2).

The Burma Municipalities Act (Burma Act III of 1898), ss. 44, 139 (4); the Burma Forest Act (Burma Act IV of 1902), s. 75; the Burma Canal Act (Burma Act II of 1905), s. 667; the Rangoon Port Act (Burma Act IV of 1905), s. 10; the Rangoon Victoria Memorial Act (Burma Act I of 1908), s. 4; the Burma Embankment Act (Burma Act IV of 1909), s. 12; the Burma Medical Act (Burma Act I of 1915), s. 11 (3); the Burma Oil-fields Act (Burma Act I of 1918), s. 10; the Burma Rural Self-Government Act (Burma Act IV of 1921), s. 74; the City of Rangoon Municipal Act (Burma Act VI of 1922), s. 237.

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18 *Nga Paw E*, (1914-1916) 2 U. B. R. 122, 10 B. L. T. 170.
19 *Arjan Mal*, (1922) 3 Lah. 440.

COMMENT

The term 'property' conveys a compound idea composed of that which is its subject, and of the right to be exercised over it It is everywhere used in this Code so as to be applicable exclusively to "that which is its subject"[1].

The General Clauses Act of 1868 says that "moveable property" shall mean property of every description except "immoveable property"[2] The Indian

The definition in the Penal Code is restricted to corporeal property, it excludes all choses in action It differs from the definitions given in the two above Acts, as it excludes incorporeal rights

1. **'Corporeal property'** is property which may be perceived by the senses, in contradistinction to incorporeal rights, which are not so perceivable, as obligations of all kinds Thus, salt produced on a swamp[4], and papers forming part of the record of a case[5], are property within the meaning of this section

In an Allahabad case the question arose, but was not decided, whether a letter received by post could be considered "moveable property" of the receiver A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H W read the letter, and put it on a table in the room and left it there H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs W's case and of improving his own position" The Court, however, refused to receive the letter It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter[6].

2. **'Land and things attached to the earth'.**—This section does not exempt "earth and things attach

the earth", "land" and "earth"

tinction between "the earth"

moveable become moveable, and it is perfectly correct to call those things attached which can be severed, and undoubtedly it is possible to sever earth from the earth, and attach it again thereto Earth, that is soil and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft[7] Any part of "the earth" whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property[8].

'Attached to earth'.—The Transfer of Property Act defines this expression. According to s 3 of that Act "attached to the earth" means

(a) rooted in the earth, as in the case of trees and shrubs,

(b) imbedded in the earth as in the case of walls of buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful gain"

1 1st Rep, s 82
2 Act I of 1868, s 2 (6)
3 Act XVI of 1908, s 3
4 *Tamma Ghantaya*, (1881) 4 Mad 228
5 *Ramaswami Aiyar v Vaithilinga Mudali* (1882) 1 Weir 28
6 *Harris*, (1917) 40 All 119

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19 *Arjan Mal*, (1922) 3 Lah. 440.

The following are held to be statutory public servants.—A Municipal Inspector within the meaning of Madras District Municipal Act (s. 41)[1]; a Sanitary Inspector within the meaning of the Madras Local Boards Act (s. 43)[2]; a Karkun employed to execute revenue processes and receive rent by a manager appointed under Act XV of 1872[3].

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Not public servants.—A lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself[9]; a Poddar of the Bank of Bengal[10]; a Mysore Policeman[11]; a peon employed by the manager of an estate under the charge of the Court of Wards[12]; a carter employed by Government[13]; an arbitrator appointed by the parties to a proceeding under s. 145 of the Criminal Procedure Code[14]; a clerk appointed by a Sub-Registrar and paid out of an allowance given to the latter[15]; a Municipal Water-Tax Collector[16]; an unpaid apprentice of Government[17]; a villager required to bring an accused person into a police-station in arrest under s. 11 of the Burma Village Act[18]; and a village chowkidar[19].

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COMMENT

The term 'property' conveys a compound idea composed of that which is its subject, and of the right to be exercised over it. It is everywhere used in this Code so as to be applicable exclusively to "that which is its subject"[1]

The General Clauses Act of 1868 says that "moveable property" shall mean property of every description except "immoveable property"[2]. The Indian

[illegible]

The definition in the Penal Code is restricted to corporeal property, it excludes all choses in action. It differs from the definitions given in the two above Acts, as it excludes incorporeal rights.

1. **'Corporeal property'** is property which may be perceived by the senses, in contradistinction to incorporeal rights, which are not so perceivable, as obligations of all kinds. Thus, salt produced on a swamp[4], and papers forming part of the record of a case[5], are property within the meaning of this section.

In an Allahabad case the question arose, but was not decided, whether a letter received by post could be considered 'moveable property' of the receiver. A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs W's case and of improving his own position." The Court, however, refused to receive the letter. It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter[6].

2. **'Land and things attached to the earth'.**—This section does not exempt "earth and things attach [illegible] the earth", "land" and "earth" [illegible] tinction between "the earth" [illegible] moveable become moveable, and it is perfectly correct to call those things attached which can be severed, and undoubtedly it is possible to sever earth from the earth, and attach it again thereto. Earth, that is soil and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft[7]. Any part of "the earth" whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property[8].

'Attached to earth'.—The Transfer of Property Act defines this expression. According to s. 3 of that Act "attached to the earth" means

(a) rooted in the earth, as in the case of trees and shrubs,

(b) imbedded in the earth as in the case of walls of buildings, or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

"Wrongful gain" — 23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

1 1st Rep. s. 82.
2 Act I of 1868, s. 2 (6).
3 Act XVI of 1908, s. 3.
4 *Tamma Ghantaya*, (1881) 4 Mad. 228.
5 *Ramasami Ayyar v. Vaithilinga Mudali*, (1882) 1 Weir 28.
6 *Harris*, (1917) 40 All. 110.
7 [illegible]

"Wrongful loss". "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully. Losing wrongfully. A person is said to gain wrongfully when such person retains wrongfully as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property[1], as well as when such person is wrongfully deprived of property.

COMMENT.

The word 'wrongful' means prejudicially affecting a party in some legal right. This word is not defined anywhere in the Code though the word "illegal" is defined in s. 43. The words 'by unlawful means' are intended to refer to an act which would render the doer liable to an action or prosecution[1].

For either wrongful loss or gain, the property must be lost to the owner or the owner must be wrongfully kept out of it. Thus, where a pledgee used a turban that was pledged, it was held that the deterioration of the turban by use was not 'wrongful loss' of property to the owner, and the wrongful beneficial use of it by the pledgee was not a 'wrongful gain' to him[2].

1. **'Wrongfully kept out of any property'.**—When the owner is kept out of possession of his property with the object of depriving him of the benefit arising from the possession, even temporarily, the case will come within the definition[3]. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense. Thus, where the accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the cow-shed to give a lesson to his master, it was held that no theft was committed as there was no wrongful loss[4].

Fees payable to a college for attending lectures are 'property' within the meaning of this section[5].

CASES.

Cattle.—Forcible and illegal seizure of bullocks of a widow in satisfaction of a debt due to the accused by her deceased husband was held to be a 'wrongful loss'[6], but not the illegal seizure and impounding of cattle, even though it was effected with the malicious intent of subjecting the owners to additional expense, inconvenience, and annoyance[7]. Merely permitting cattle to stray was held not to establish any intention of causing 'wrongful loss' to the public or any person[8].

Secreting a document.—Where the plaintiff, in a suit referred to arbitration, with a view to prevent a witness from referring to an endorsement on a bond, snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that it could hardly be inferred from those circumstances that the act of the accused was prompted by any desire to cause 'wrongful loss' or 'wrongful gain'[9].

1 *Nga Te*, (1904) 2 L. B. R. 216, F.B.; *Athi Ayyar*, (1920) 14 L. W. 728.
2 (1868) 3 M. H. C. App. 6.
3 *Nabi Baksh*, (1897) 25 Cal. 416.
4 *Ibid.*
5 *Soshi Bhushan*, (1893) 15 All. 210, 216.
6 *Preonath Banerjee*, (1866) 5 W. R. (Cr.) 68.
7 *Aradhun Mundul v. Miyan Khan Takadgeer*, (1875) 24 W. R. (Cr.) 7.
8 *Toorebajkhan*, (1868) Unrep. Cr. C. 11.
9 *Subramania Ghanapati*, (1881) 3 Mad. 261.

Breach of a condition is not 'wrongful loss'.—Where a person who purchased rice from a famine relief officer at a certain rate, on condition that he should sell it at a pound the rupee less did not sell it at the rate agreed upon but at four pounds the rupee less it was held that no wrongful gain or wrongful loss had been caused to anyone within the meaning of this section The rice having been sold to the accused and he having paid for it, it was not unlawful for him to *sell it again at such prices as he thought fit*[1]

24 Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly

Dishonestly

COMMENT

From this definition it will appear that the term dishonestly is not used in the Code in its popular significance Unless there is wrongful gain to one person, or wrongful loss to another an act would not be dishonest The word dishonestly is used as bearing relation with property The intention under the section must be to cause wrongful gain or wrongful loss to a person The word intent by its etymology seems to have metaphorical allusion to archery and implies aim' and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive without which the action would not have been taken [2]

The definition of the word dishonestly is not exhaustive[3]

The word 'dishonestly occurs alone in the definition of theft (s 378) extortion (s 383) robbery (s 390) criminal misappropriation (s 403) criminal breach of trust (s
word fraudulently
(s 415) forgery (s

The word fraudulently' occurs alone in the definition of many offences chief of which are offences against public justice (ss 206 208 210) weights and measures (ss 264 266) and counterfeit coins and stamps (ss 242 243 252 253 261 263)

The law takes into account the primary or immediate intention and not the secondary or remote Thus If A takes an article belonging to Z out of Z's possession without Z s consent with the intention of keeping it until he obtains money from Z as a reward for its restoration he takes it dishonestly and commits theft[4] As every man is presumed to intend the natural consequences of his act it is from the consequences that the Court has often to presume the intention of the accused in doing a particular act The law does not look to the motive it looks only to the intention Motive and intention are two different things Motive is directed to the ultimate end good or bad which a person hopes to secure his intention is concerned with the immediate effects of his acts End cannot justify the means in other language the motive does not justify the intention Take the case of a scoundrel or a man of bad character, whom it might be desirable to destroy on the spot but if a person takes the law into his own hands and kills him, none the less he is *guilty of murder*

[1] *Lal Mahomed* (1874) 22 W R (Cr) 82
[2] Per Batty J in *Bhagwant v Kedari* (1900) 2 Bom L R 986 1009 25 Bom 2?? 2 C
[3] *Baju Jha* (1928) 9 P L T 800 30 Cr L J 236.
[4] Sect n 378 ill (f)

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud[1], but not otherwise.

"Fraudulently".

COMMENT.

"As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined,....whether the word 'defraud'....implies the deprivation or intended deprivation of property as a part or result of the fraud"[1].

The word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part[2].

I. 'Intent to defraud'.—"The word 'intent,' by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken"[3]. The terms 'fraud' and 'defraud' are not defined in the Penal Code. The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation, and, as it is not defined, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is found[4]. Sir James Stephen, in his History of the Criminal Law of England[5], observes: "There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional...A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent".

Approving these observations, the Allahabad High Court has laid down that where there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud[6]. A somewhat wider interpretation has been placed on the word 'fraud' in *Haycraft* v. *Creasy*[7], which is expressly followed by the

1 Per Maclean, C. J., in *Abbas Ali*, (1896) 25 Cal. 512, 521, F.B.

2 *Ibid.*

3 Per Batty, J., in *Bhagwant* v. *Kedari*, (1900) 25 Bom. 202, 226, 2 Bom. L. R. 986, 1009.

4 *Abbas Ali*, sup., p. 521.

5 Vol. II., p. 121; *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 713, 2 Bom. Cr. C. 115, 120, 37 Bom. 666.

6 *Muhammad Saeed Khan*, (1898) 21 All. 113, 115.

7 (1801) 2 East 92, 108.

Bombay High Court[1] Le Blanc, J, in the judgment, says "By *fraud*, I understand an intention to deceive, whether it be from any expectation of advantage to the party himself, or from ill will towards the other is immaterial'

The expression 'intent to defraud' implies conduct coupled with intention to deceive and thereby to injure, in other words, 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is infringement of some legal right possessed by him but not necessarily deprivation of property[2] The issuing of a false statutory report of a company calculated to deceive the public and intended to induce them to invest their money in the company which they would not otherwise have invested is an act done 'with intent to defraud' within the meaning of this section[3] Where the accused, after the execution and registration of a document which was not required by law to be attested, added his name to the document as an attesting witness, but without putting a date or alleging actual presence at the time of its execution, it was held that this act was neither fraudulent nor dishonest and that the accused was therefore not guilty of forgery[4] Similarly, where the accused attested a document, without the authority of the executant, after its execution, to prevent other people from setting up a claim to the property in the possession of the accused under the document, it was held that he was not guilty of forgery for there was no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused[5] The accused, in order to obtain recognition from a Settlement Officer that they were entitled to the title of "Loskur," filed a *sannad* before that Officer purporting to grant that title This document was found not to be genuine and they were convicted under ss 471 and 464 by the Sessions Judge It was held that they could not be found guilty as their intention was not to cause wrongful gain or wrongful loss to any one, but to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of "Loskur" and that this could not be said to constitute an intention to 'defraud'[6]

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would be sufficient to support a conviction[7] In order to prove an intent to defraud it is not at all necessary that there should have been some person defrauded, or who might possibly have been defrauded A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, [illegible] be no *intent* to defraud, though there [illegible] l, but where another person has no [illegible] that he has, [illegible] here would be an intent to defraud [illegible] be defrauded'[8] When it is material [illegible] be given of similar offences by the defendant[9]

'Fraudulently' : 'Dishonestly'.—There is a real distinction between the meaning of the terms 'fraudulently' and 'dishonestly', the former denotes an intention to deceive The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon

1 *Vithal Narayan* (1886) 13 Bom 515n, followed in *Lolit Mohan Sarkar*, (1894) 22 Cal 313, 322, and in *Khandusingh*, (1896) 22 Bom 768

2 *Surendra Nath Ghose* (1910) 38 Cal 75, 89, 14 C W N 1070 followed in *Harjivan Valji* (1925) 28 Bom L R 115, 123 50 Bom 174, *Robinson*, (1921) 22 Cr L J 681

3 *Ram Chand Gurwala* (1926) 27 Cr L J 1383

4 *Surendra Nath Ghose*, (1910) 38 Cal 75, 14 C W N 1076

5 [illegible]

6 [illegible]

7 [illegible]

8 [illegible] Den [illegible]

9 *Simmonds*, (1909) 2 Cr App R 303

the basis of the particular document produced, though may not be dishonest within the meaning of s. 24, may yet be fraudulent within the meaning of s. 471[1].

"Reason to believe."

26. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.

COMMENT.

The expression "reason to believe" occurs in ss. 411 to 414.

See Comment on s. 414 where the word 'believe' is distinguished from 'suspect.'

Property in possession of wife, clerk or servant.

27. When property is in the possession of a person's wife[1], clerk or servant[2], on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

COMMENT.

Under this section property in the possession of a person's wife, clerk or servant, on account of that person is deemed to be in that person's possession.

Object.—The object of the framers of the Code in the Explanation is to lay down a few rules, in accordance with the general sense of mankind, for the purpose of preventing any difference of opinion arising in cases likely to occur very often.

Principle.—This section abrogates the distinction made by the English law between 'possession' and 'custody'. But it does not express the complete thought of the legislature on the question of possession[2].

According to English law 'possession' is used as regards the owner, whereas 'custody' is used to mean 'such a relation towards the thing as would constitute possession if the person having custody had it on his own account.[3]" What would be a mere 'custody' under English law would be 'possession' under the Code.

Corporeal property is in a person's possession when he has such power over it that he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or of some person for whom he is a trustee. But a wife, a clerk, or a servant, has not this power or intention to deal with things in their charge as owners. They are, therefore, said to have custody merely according to English law.

A man's goods are in his possession, not only while they are in his house or on his premises, but also when they are in a place where he may usually send them (as when horses and cattle feed on common land), or in a place where they may be lawfully deposited by him, as if he buries money or ornaments in his own land, or puts them in any other secret place of deposit.

1. 'Wife'.—A permanent mistress may be regarded as a 'wife.' When a man furnishes a house for his mistress' occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. But the inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress' possession[4].

1 *Kedar Nath Chatterjee,* (1901) 5 C. W. N. 897.

2 *Fateh Chand,* (1916) 44 Cal. 477.

3 Stephen's Degest of Criminal Law, p. 243.

4 *Banwari Lal,* (1914) P. R. No. 20 of 1914.

2. 'Clerk or servant'.—The possession by a clerk or servant of that which belongs to the master, or of that which, whether it belongs absolutely to his master, or to another person, the clerk or servant holds for his master and on his account, is the master's possession. The possession of the servant must be on account of his master to make the master liable. A pistol was discovered lying on the floor of a shop which could not reasonably be expected to be dealing in such articles. At the time of the discovery the shop was in charge of a servant and there was no proof that he was holding the pistol for his master. It was held that the master was not liable[1].

28. A person is said to "counterfeit" who causes one thing[1] to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

"Counterfeit"

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

COMMENT

The word *'counterfeit'* occurs in offences relating to coin provided in Chapter XII, and offences relating to trade and property marks in Chapter XVIII.

Under this section it is not necessary to show that deception actually took place. Intention to practise deception by causing one thing to resemble another is quite sufficient.

1. 'Thing'.—The thing may be a coin or a piece of metal. Its value is immaterial. The counterfeit coin may be more valuable so far as money value is considered than the coin for which it is intended to pass.

When the coins counterfeited are such imitations of the genuine coin as might deceive people on account of the resemblance, the presumption referred to in Explanation 2 arises[2]. Altering used stamps so as to resemble genuine unused stamps amounts to counterfeiting[3].

Amendment.—Explanations 1 and 2 were substituted for the original explanation by Act I of 1889, s. 9.

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used,[1] or which may be used, as evidence of that matter.

'Document'

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or

1 *Chhotey*, (1922) 20 A L J 853.
2 *Qadir Bakhsh*, (1907) 30 All 93.
3 *Ramlal*, (1920) 22 Cr L J 289.

whether the evidence is intended for, or may be used in, a Court of Justice, or not.

ILLUSTRATIONS.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

ILLUSTRATION.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

COMMENT.

The term 'document' seems to include everything done by the pen, by engraving, by printing, or otherwise, whereby is made on paper, parchment, wood, or other substance a representation of words or other equivalents addressed to the eye. This word occurs in ss. 167, 175, 192, 204, 464 and 479.

The definition here given seems to be faulty; because the "matter described" is manifestly not the "document". According to English law the material on which words are written is said to be a 'document'. Under the Code it is the matter written and not the material that is called a 'document'. But the matter should be intended to be used as evidence of that matter. A writing is a document. Words printed, lithographed, or photographed are documents. A map or plan is a document. An inscription on a metal plate or stone is a document. A caricature is a document. Letters or marks imprinted on trees and intended to be used as evidence that the trees were passed for removal by a Ranger of a forest, are a document[1]. A hammer for marking sleepers is a document[2].

An avouchment, whether written or printed, of the character or quality of a chattel, is not a document which, if false, would be a forgery, e.g., the false signature of an artist's name to a picture[3], or enclosing spurious goods in a wrapper imitating a trade mark[4]. But an instrument, though not signed by all parties thereto, fulfils the requirements of the definition of "document"[5].

Section 3 of the Indian Evidence Act (I of 1872) says that 'document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter.

1 *Krishtappa Khandappa,* (1925) 27 Bom. L. R. 599, 8 Bom. Cr. C. 41.

2 *A. V. Joseph,* (1924) 3 Ran. 11.

3 *Thomas Closs,* (1858) Dears. & B. 460.

4 *John Smith,* (1858) 27 L. J. (M. C.) 225.

5 *Ramaswami Ayyar,* (1917) 41 Mad. 589.

Section 3 (16) of the General Clauses Act says that 'document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter

1. **'Intended to be used'.**—A writing which is not legal evidence of the matter expressed may yet be a document, if the parties framing it believed it to be, and intended it to be, evidence of such matter[1]

Amendment—The present explanations were substituted by Act I of 1889, s 9

"Valuable security"

30 The words "valuable security" denote a document which is, or purports to be[1], a document whereby any legal right is credited, extended, transferred, restricted extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right

ILLUSTRATION

A writes his name on the back of a bill of exchange As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security"

COMMENT

The words "valuable security' denote a particular class of documents, viz, such documents as create or extinguish legal rights This expression occurs in ss 329 331, 347, 348, 420, 467 and 477

1 **'Which is, or purports to be'.**—The use of the words "which is, or pur ports to be" indicates that a document, which, upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immovable property, although a decree could not be passed upon the document is contemplated within the purview of that section Had it not been so any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law and on which no decree could be passed by a civil Court, could not be called a valuable security[2]

Copy—The term "valuable security" applies to the original document, and not to a copy

Cancelled instrument—A cancelled instrument is not a valuable security, ' for an instrument available for the purpose for which it was made is clearly what the clause intended, a cancelled instrument therefore, though by the cancelling of it a legal right may be 'extinguished, inasmuch as the instrument upon which such right depended is thereby avoided, does not fall within its scope '[3]

Unstamped document—The fact that a document has not been stamped or not properly stamped, and is not, therefore, receivable in evidence, does not prevent its being a valuable security[4] This is so because such a document "purports to be' a valuable security A document whereby a person acknowledges himself to be under a legal liability is a valuable security[5]

1 *Sheefait Ally* (1868) 10 W R (Cr) 61, 2 Beng L R 12

2 *Ram Harakh Pathak* (1925) 48 All 140

3 1st Rep s 89

4 (1873) 7 M H C App 26, *Ramasami*, (1888) 12 Mad 148

5 *Idu Jolaha* (1917) 3 P L J 356

Unregistered document.—An unregistered document, though it may not be a valuable security until the registration is completed still "purports" to be a valuable security[1].

Valuable securities.—A settlement of accounts in writing, though not signed by any person, and containing no promise to pay[2]; a kabulayat[3]; a deed of divorce[4]; a *hundi*[5]; and a counterfoil of a paying-in slip purporting to be an acknowledgment of receipt of a sum of money by a bank[6], are valuable securities.

A signature purporting to be that of B was forged on each of two printed forms, one intended to be used as a promissory note and the other as a receipt. The blank spaces left for entering particulars of the amount, the name of the person in whose favour the document was executed, the date and place of execution and the rate of interest, were not filled in; a one-anna stamp was affixed on the top of each paper, but the stamp was neither signed across nor cancelled in any way. It was held that the documents, as they stood, were valuable securities[7]. A document, though not signed by all the parties thereto, is a valuable security if it imposes an obligation on the actual executants and an option on the others and there is no condition precedent to be found in the document that the document is to be inoperative against the executants until all the parties executed it[8]. Where with a view to arriving at a compromise appellant executed a *patta* purporting to create a legal right in the other party in the land in dispute and although the land comprised in the said *patta* belonged to a family of six, it was signed by the appellant and the respondent only as representing the family, it was held that the document came within the definition of valuable security[9].

Not valuable securities.—The copy of a lease[10], a sannad purporting to confer a personal title[11], a postal receipt for an insured parcel[12], and a copy of a decree passed by a Court[13], are not valuable securities.

"A will".

31. The words "a will" denote any testamentary document.

COMMENT.

A "will" is a disposition or declaration by which the person making it provides for the distribution or administration of property after his death. It does not take effect until the testator's death, and is always revocable by him.

The Indian Succession Act[14] defines 'will' as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death". The General Clauses Act[15] says that 'will' "shall include a codicil and every writing making a voluntary posthumous disposition of property". This term occurs in ss. 467 and 477 of the Code.

Words referring to acts include illegal omissions.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts[1] done extend also to illegal[2] omissions[3].

1 *Kashi Nath Naek,* (1897) 25 Cal. 207.
2 *Kapalavaya Saraya,* (1864) 2 M. H. C. 247.
3 (1866) 6 W. R. (Cr. L.) 2; *Nasiruddin,* (1883) 3 A. W. N. 59.
4 *Azimooddeen,* (1869) 11 W. R. (Cr.) 15.
5 *Lekhraj,* (1910) P. W. R. No. 55 of 1910.
6 *Turner,* (1924) 29 C. W. N. 868.
7 *Jawahir Thakur,* (1916) 38 All. 430.
8 *Ramaswami Ayyar,* (1917) 41 Mad. 589.
9 *Ram Harakh Pathak,* (1925) 48 All. 140.
10 *Khushal Hiraman,* (1867) 4 B. H. C. (Cr. C.) 28; *Naro Gopal,* (1868) 5 B. H. C. (Cr. C.) 56.
11 *Jan Mahomed,* (1884) 10 Cal. 584.
12 *Arura,* (1912) P. L. R. No. 299 of 1913; *Sadho Lal,* (1916) 3 P. L. W. 99.
13 *Charu Chandra Ghose,* (1923) 39 C. L. J. 12.
14 X of 1865, s. 3.
15 X of 1897, s. 3 (57).

COMMENT

This section simply says that acts include illegal omissions

1. **'Acts'.**—An 'act' generally means something voluntarily done by a person 'Act' is a determination of the will producing an effect in the sensible world This word includes writing and speaking, or, in short any external manifestation In the Code the term 'act is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omissions

2 **'Illegal'.**—See *post*, s 43

3. **'Omissions'.**—This word is used in the sense of intentional non doing Thus, according to this section act includes intentional doing as well as intentional non doing The omission or neglect must no doubt be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred[1] The Code makes punishable omissions which have caused which have been intended to cause or which have been known to be likely to cause a certain evil effect in the same manner as it punishes acts, provided they were illegal And when the law imposes a duty to act on a person his illegal omission to act renders him liable to punishment[2]

"Act
"Omission

33. The word "act" denotes as well a series of acts as a single act the word "omission" denotes as well a series of omissions as a single omission

COMMENT.

The effect of s 32 and this section taken together is that the term 'act' comprises one or more acts or one or more illegal omissions

An act may constitute an offence under two or more enactments[3]

Acts done by several persons in furtherance of common intention

34 When a criminal act is done by several persons[1], in furtherance of the common intention of all[2], each of such persons is liable for that act in the same manner as if it were done by him alone[3].

COMMENT

This section deals with the doing of separate acts similar or diverse, by [illegible] each person [illegible] section does [illegible] iment on the latter section

Object —This section is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them[6] The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support, and protection to the person actually committing the act

1 *Thornotti Madathil Poker*, (1880) 1 Weir 495
2 *Lal Khan* (1895) 20 Bom 394
3 *Setha Ayyar v Venkatasubba Chetty*, (1903) 33 M L T 263
4 *Barendra Kumar Ghosh* (1924) 27 Bom L R 148 158 [illegible] Cal 197 52 I A 40, *Maung Tun* (19[illegible]) 5 B L J 12, *Mian Akar*, (1928) 10 L L J 363
5 *Barendra Kumar Ghosh* (1923) 28 C W N 170 38 C L J 41
6 *Nga Po Sein* ([illegible]) 1 L B R [illegible]

Principle.—Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility[1]. It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can it inquire, even if it were possible, as to the part taken by each in the crime[2]. All are guilty of the principal offence, not of abetment[3]. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined[4]. But a party not cognizant of the intention of his companion to commit murder is not liable, though in his company, to do an unlawful act[5]. For instance, "if three persons go out to commit a felony, and one of them unknown to the others, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out"[6].

Scope.—This section does not require proof that any particular accused was responsible for the commission of the actual offence[7].

It provides not only for liability to punishment, but also for subjection to another jurisdiction. If a foreigner in foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed[8].

This section has no application in the construction of ss. 397 and 398, though it may be read with ss. 392 and 395 to determine the substantive offence which is created[9]. It cannot be used to make a co-accused liable to the minimum punishment laid down in s. 397 because one accused is so liable[10].

It applies to a case under the second part of s. 304[11].

1. **'Criminal act is done by several persons'.**—The section contemplates the case where more persons than one share in the doing of the act, and it is necessary to bear in mind the definition of 'act' given in s. 33 and also the provisions of ss. 35, 37 and 38[12]. A 'criminal' act means that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence[13].

The section only comes into operation when there is a substantive charge o fan offence having been committed[14].

[1] *Ganesh Sing* v. *Ram Raja*, (1869) 3 Beng. L. R. (P. C.) 44, 45.
[2] *Ibid.*
Pha Laung, (1906) 3 L. B. R. 264; but see *Po Ya*, (1919) 13 B. L. T. 44.
[4] *Nga Po Sein*, (1902) 1 L. B. R. 233.
[5] *Duffey's case*, (1830) 1 Lewin 194. See *Duma Baidya*, (1896) 19 Mad. 483.
Per Park, J., in *Duffey's case, ibid.*
[7] *Manindra Chandra Ghose*, (1914) 41 Cal. 754.
[8] *Chhotalal Babar*, (1912) 14 Bom. L. R. 147, 1 Bom. Cr. C. 88.
[9] *Ali Mirza*, (1923) 51 Cal. 265; *Abdullah*, (1926) 27 Cr. L. J. 949; *Bachna*, (1926) 28 Cr. L. J. 17.
[10] *Po Myaing*, (1920) 10 L. B. R. 269; *Dulli*, (1924) 47 All. 59.
[11] *Abdul Gaffur Panchayet*, (1926) 45 C. L. J. 131; *Adam Ali Taluqdar*, (1926) 31 C. W. N. 314. Contra, *Aniruddha Mana*, (1924) 26 Cr. L. J. 827.
[12] *Nga Tun Baw*, (1907) 14 Burma L. R. 264.
[13] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 162, 52 Cal. 197, 52 I. A. 40, overruling *Nirmal Kanta Roy*, (1914) 41 Cal. 1072 and *Profulla Kumar Mazumdar*, (1922) 50 Cal. 41.
[14] *Reazuddi*, (1912) 16 C. W. N. 1077.

2 **'In furtherance of the common intention of all'.**—Acts done in furtherance of common intention make all equally liable for the results of all the acts of others Mahmood, J , in *Dharam Rai's* case[1] said ' This section was the subject of consideration impliedly in the case of *The Queen* v *Gora Chand Gopee*[2]. At p 456, Sir Barnes Peacock clearly laid down the rule of law that mere presence of persons at the scene of an offence is not, *ipso facto*, sufficient to render them liable to any rule such as s 34 enunciates, and that 'the furtherance of a common design' was an essential condition before such a rule applied to the case of an individual person It was probably in consequence of this expression of view from such a high authority that the Legislature by s 1 of Act XXVII of 1870, repealed the

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distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act We have the opinion of an American jurist on the point, whom Mr Mayne, in his Commentary on the Indian

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different wrong' This seems to me to be the right interpretation of the words in *'furtherance of the common intention of all* as they occur in s 34 of the Indian Penal Code There is another section in that Code which is somewhat similarly worded, and seems to turn upon the same principle, so far as this particular point is concerned That section is 149, which, instead of using the words quoted above, uses the words 'in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object' It will be observed that while s 34 limits itself to the furtherance

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that any sudden and unpremeditated act done by a member of an unlawful assembly would not render all the other members liable therefor, unless it was shown that the assembly did understand and realize either that such offence would be committed or was likley to be necessary for the common object ' Thus to establish guilt under s 34 it is necessary to prove a common intention as distinguished from a common object as in s 149 and it must be shown that the criminal act was committed in furtherance of that intention[4]. The words 'common intention' in s 34 and 'common object' in s 149 are not synonymous The object of an assembly as a whole may not be the same as the intention which several persons may have when in pursuance of that intention they perform a criminal act and it may well be that the object of the assembly was lawful whereas the intention common to those of the assembly who jointly committed a criminal act was in itself criminal and the joint criminal act must be equally imputed to all of them The accused with some others were convicted by a Magistrate under s 326 read with s 149 The Sessions Judge found that the element of an unlawful common object in the assem-

1 (1887) 7 A W N 236, 237
2 (1866) Beng L R, Sup Vol, 443, 5 W R (Cr) 45
3 (1873) 11 Beng L R 347, F B.
4 *Bitbaran Singh*, (1917) 4 P L W 120 *Bhabataran Mahto* (1925) 7 P L T 358.

gang having been prior to the murder, there could be no common object[1]. Four men joined in committing a robbery. Two of them went from house to house bullying and ill-treating the inmates and making them give up their valuables while the other two kept guard on the house tops. Of the latter pair one was armed with a gun, which he fired off several times. When the villagers began to make it unpleasant for the robbers by throwing stones, he shot and killed one of them who took a prominent part in the stone throwing. It was held that those who went on bullying were not liable for the act of the one who shot the villager as the act which caused the death was not done by several persons but only by one[2]. One D was killed by one blow on his head with some sharp weapon. The accused B and M with others armed with *gandasas* had invaded the compound where D was sleeping, and had immediately assaulted D and that one of their number struck him on the head and killed him. The accused's intention was to insult and disgrace one K. The accused M, who gave the fatal blow, was convicted under s. 302 and B was convicted of abetment of grievous hurt under s. 325 read with s. 109. As both the accused had armed themselves with deadly weapons B must have known that in case of opposition the weapons would be used and in all probability grievous hurt would be caused[3].

The appellant was charged under s. 302 with the murder of a Post-master. At the trial the evidence showed that while the Post-master was in his office counting money, three men, of whom the appellant was one, fired pistols at him after having called upon him to hand over the money; he was hit in two places and died. The trial Judge directed the jury that if they were satisfied that the Post-master was killed in furtherance of common intention of all three men, then the appellant was guilty of murder, whether he fired the fatal shot or not. It was held that upon the true construction of this section, especially having regard to ss. 33, 37 and 38, the direction was correct[4]. Where five persons armed with big sticks or clubs joined together to forcibly carry off a girl and grievous hurt was caused to persons attempting to prevent the girl being carried off by any one of them it was held that all must be regarded as being responsible for the hurt caused[5]. Where four persons armed with heavy sticks came up with the set purpose of making a serious onslaught on three brothers who were grazing their flocks of sheep, goats and other cattle, and inflicted a number of fatal blows, with the result that two of them became insensible and died soon after, and the third, though he did not loose consciousness, could not move. It was held that this section was applicable and all the accused were guilty of culpable homicide even although it was not known as to who struck the fatal blow[6]. Where the accused and his son attacked the deceased who succumbed to the injuries, and it was put forward in defence of the accused that the sole common intention of the accused and his son was to cause grievous hurt to the deceased by the use of a spear and long bamboo, and that thereafter when the accused's actions had ceased, the son proceeded to stab the deceased to death whilst accused stood aside and took no further part in the matter, it was held that the intentions and actions of the accused and his son could not be divided into two parts and the accused was guilty under s. 302 read with this section[7].

Where both master and servant were present at the sale of *ganja* in contravention of the terms of his license and the servant received the money paid

[1] *Hari Bijal*, (1915) 17 Bom. L. R. 906, 3 Bom. Cr. C. 118.

[2] *Harnam Singh*, (1919) P. R. No. 21 of 1919.

[3] *Bahal Singh*, (1918) P. R. No. 24 of 1919; *Hari Singh*, (1926) 27 Cr. L. J. 233.

[4] *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 162, 52 Cal. 197; *Said Nur*, (1925) 1 Lah. C. 531, 536; *Sher Muhammad*, (1927) 28 Cr. L. J. 854.

[5] *Allah Rakha*, (1925) 2 Lah. C. 34.

[6] *Pira*, (1925) 8 L. L. J. 198, 27 P. L. R. 347; *Pakhar Singh*, (1928) 11 L. L. J. 20.

[7] *Maung Twa*, (1926) 5 B. L. J. 12; *Bhagwat Singh*, (1928) 9 P. L. T. 826.

for the *ganja*, it was held that the servant was guilty of the offence of selling *ganja* without a licence by the operation of this section[1]

English cases —Where Lord Dacre agreed with several persons to hunt in another's park for deer, and to kill all who might resist, one of the party having killed the keeper, all were held to be guilty of the murder, though Lord Dacre was a quarter of a mile distant, and knew nothing of the individual blow[2]

Three soldiers went together to rob an orchard, two got upon a pear tree and the third stood at the gate with a drawn sword in his hand The owner's son coming by collared the man at the gate and asked him what business he had there and thereupon the soldier stabbed him It was held that he had committed murder, but that those on the tree were innocent It would have been otherwise if they [illegible][3] Two soldiers came [illegible] which he refused, [illegible] ent away uttering imprecations Some time after one of them rushed in, the other remaining out, and renewed his demand for beer On his refusing to depart the landlord pushed him towards the outer door where the other soldier gave the landlord a violent blow with a sharp instrument on the head The landlord died after a few days It was held that both the soldiers had committed murder notwithstanding the previous struggle between the landlord and one of them[4]

3. 'Each of such persons is liable for that act in the same manner as if it were done by him alone'.—All who participate in the commission of an offence are severally responsible as though the offence had been committed by each of them acting alone, consequently each must be separately punished[5]

Mere presence does not raise a presumption of complicity.—Although a man is present when a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it, or to apprehend the felon All who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals[6] The mere circumstance of a person being present on a lawful occasion does not therefore, raise a presumption of that person's complicity in an offence then committed[7]

Amendment.—The words "in furtherance of the common intention of all" were introduced by Act XXVII of 1870, s 1

PRACTICE

Calcutta Rule.—When several persons are accused of the commission of the same offence, it would be obviously inconvenient if a Magistrate were to punish some and commit others to the Court of Session, and, as the Code does not seem to contemplate such procedure, the Magistrate should, if he considers the case to be one for the Sessions, commit all those concerned for trial before that tribunal[8]

When such an act is criminal by reason of its being done with a criminal knowledge or intention

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same

[1] *Keshwar Lal Shaha v Girish Chunder Dutt* (1902) 29 Cal 496

[2] *Dacre's case*, Palm 35, 1 Hale P C 439

[3] Foster, 353

[4] *Willoughby*, (1791) 1 East P C 288

[5] *Amrita Lal Bose v Corporation of Calcutta*, (1917) 44 Cal 1025

[6] *Gora Chand Gopee*, (1866) 5 W R (Cr) 45, Beng L R Sup Vol, 443. See *Coney* (1882) 8 Q B D 534

[7] *Maganlal* and *Motilal*, (1899) 14 Bom 115 *Ganapathi Sarma*, (1922) 17 L W 107, [1923] M W N 104

[8] C H R and O, Vol I, Ch I, s 40 p 14

manner as if the act were done by him alone with that knowledge or intention.

COMMENT.

This section follows as a corollary from s. 32. The legal consequences of an 'act' and of an 'omission' being the same, if an act is committed partly by an act and partly by an omission the consequences will be the same as if the offence was committed by an 'act' or by an 'omission' alone.

The preceding section provided for a case in which a criminal act was done by several persons in furtherance of the common intention of all. Under this section a person assisting the accused, who actually performs the act, must be shown to have the particular intent or knowledge if the act is criminal only by reason of its being done with a criminal knowledge or intention.

If several persons, having one and the same criminal intention or knowledge, jointly commit murder or an assault, each is liable for the offence as if he had acted alone: but if several persons join in an act, each having a different intention or knowledge from the others, each is liable according to his own criminal intention or knowledge, and he is not liable further.

If an act which is an offence in itself and without reference to any criminal knowledge or intention on the part of the doers is done by several persons, each of such persons is liable for the offence.

This section makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention, each person is liable for the act to the extent of his knowledge or intention: in other words, the Court or the jury have to consider what is the knowledge or intention with which each person joined in the act[1]. A and B beat C who dies. A intended to murder him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt[2].

Effect caused partly by act and partly by omission.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

ILLUSTRATION.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

COMMENT.

This section shows that when an offence is the effect partly of an act or partly of an omission, it is one offence only[3].

Co-operation by doing one of several acts constituting an offence.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

1 *Adam Ali Taluqdar,* (1926) 31 C. W. N. 314.

2 *Ibid.*

3 Per Mukerjee, J., in *Barendra Kumar Ghosh,* (1923) 28 C. W. N. 170, 189, 38 C. L. J. 411, 543.

ILLUSTRATIONS.

(a) A and B agree to murder Z by severally and at different times giving him small doses of poison A and B administer the poison according to the agreement with intent to murder Z Z dies from the effects of the several doses of poison so administered to him Here A and B intentionally co operate in the commission of murder, and as each of them does an act by which the death is

[illegible]

death, illegally omits to supply Z with food, in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death A is dismissed from his office, and B succeeds him B, without collusion or co operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death Z dies of hunger B is guilty of murder, but, as A did not co operate with B, A is guilty only of an attempt to commit murder

COMMENT

This section provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common

[illegible]

if each person has his several part to do, the whole contributing to one result It is immaterial what particular share is allotted to each, or whether the object be accomplished jointly by all present at the same time and place, or each performs his own part separately Where all concur in effecting the criminal result each does the act so far as his own part extends, and, as to the residue, may be regarded as causing it to be done by means of a guilty agent All the persons concerned stand in the mutual relation of principals and agents to each other If, for instance several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals[2] Where two persons are acting in concert in the sense that their attack on the deceased (with a heavy stick by the one, and with a heavy stone by the other) is a single indivisible thing both of them are liable for the resultant murder[3] Three persons brothers attacked with heavy sticks a fourth, against whom they bore a grudge, and beat him with great severity, so that he died shortly afterwards His skull was badly fractured, and numerous other injuries were inflicted upon him It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death It was held that all the three assailants were guilty of murder[4]

Persons concerned in criminal act may be guilty of different offences

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

[1] *Barendra Kumar Ghosh*, (1924) 52 I A 40 27 Bom L R 148 158 52 Cal 197

[2] *John Bingley* (1821) R & R 446.

[3] *Subbappa Channappa*, (1912) 15 Bom L R 303, 2 Bom Cr C 54

[4] *Ram Newaz*, (1913) 35 All. 506.

ILLUSTRATION.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpble homicide.

COMMENT.

This section provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other[1].

Sections 31, 35 and 38 deal with the same subject and should be read together. Section 34 treats of acts done with a 'common intention', s. 38 of acts done with different intentions. Thus it is the converse of s. 34. Under this section the act is not supposed to be done with a 'common intention'. A quarrel arose between C on the one side and A and B on the other. C abused A, whereupon A struck him with a stick, and B struck him down with an axe on the head. He also received two other wounds with the axe on other parts of the body. Any one of the three axe-wounds was sufficient to cause death, more especially that on the head. It was held that B was guilty of culpable homicide, while A was guilty of voluntarily causing hurt[2].

Sections 34 to 38 lay down principles similar to the English law of "principals in the first and second degrees". See Comment on s. 107, *infra*.

39. A person is said to cause an effect "voluntarily" when he causes it by means[1] whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

"Voluntarily".

ILLUSTRATION.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

COMMENT.

The word 'voluntarily' is defined in relation to the causation of effects and not to the doing of acts from which those effects result. It has been given a peculiar meaning, differing widely from its ordinary meaning, in the Code.

In general, the Code makes no distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. If the effect is a probable consequence of the means used by him he causes it 'voluntarily', whether he really meant to cause it or not. He is not allowed to urge that he did not know or was not sure that the consequence would follow; but he must answer for it just as if he had intended to cause it. The English law by means of an artificial presumption, viz., that a man is presumed to intend the natural or probable consequences of his own act, gives to the words which denote intention the meaning here annexed to 'voluntarily'[3]. See s. 81, *infra*.

1 *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 158, 52 Cal. 197.

2 *Indar*, (1882) 2 A. W. N. 23.

3 M. & M. 21.

The definition of the term 'voluntarily' bears resemblance to the definition of 'wilfully', current in the English law

An injury shall be deemed to be 'wilfully' caused whensoever the person from whose act or omission such injury results, either directly intended it to result from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury[1]

The principle of exemption from criminal responsibility in respect of a hurtful consequence is that of bona fide ignorance of the connexion existing between the mere mechanical act and its consequence That principle ceases to operate where the connexion is known to be either certain or probable If the doer of an act know or believe that a noxious consequence will result from that act, he is just as culpable both in Law and Morals as if he had acted with the most direct intention to hurt Let it however be supposed that the consequence is not certain, but that it is a likely or probable consequence, and that the likelihood or probability is known to the doer of the act Here again it is clear that the principle of exemption above mentioned is unavailable to exempt the offender from liability in respect of the consequence All he can urge is that he was not sure that the hurtful consequence would follow, but he had no right to incur the risk and danger of producing the mischief and having done so is justly responsible for it he cannot reasonably complain that the Law did not give him notice of the penalty annexed to the offence, or that he did not wilfully offend for the Law may justly, after due notification, doom such an offender to the penalties inflicted on those who accomplish their purposes by more certain or direct means, the safety of society is inconsistent with any distinction in this respect, and the offender in truth acted wilfully, in wilfully incurring the risk and danger of causing the injurious result[2]

I "**Means**" —This word signifies acts as well as omissions

40 Except in the chapter and sections mentioned in clauses two and three of this section the word "offence"[1] denotes a thing made punishable[2] by this Code

'Offence

In Chapter IV, Chapter V-A and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

COMMENT.

The word 'offence' as defined in this section has three sets of meaning, as explained in the three clauses of this section

[1] 10th P R 16 p 23 cited in First Rep, s. 106.
[2] English Law Commissioners' 7th Rep

1. **'Offence'.**—This word does not extend to acts punishable under the of England. Stokes says that the Code is defective in not declaring that in cei sections (e.g., ss. 216, 221, 224, 225), 'offence' shall include acts and omis: punishable by the law of England.

2. **'A thing made punishable'.**—In *S. Moorga Chetty's* case[1] West, remarked: "If verbal criticism is to have a preponderating influence, I may obs that there is an inaccuracy in section 40. 'A thing', meaning an act or omis is not susceptible of punishment. What is meant is 'a thing for which he is guilty of it is punishable' ". The term 'a thing' is a rather unhappy substi for what it seems to mean—"an aggregate of acts or omissions"[2]. A 'tl must be an *act*, or a series of illegal *acts*, or an illegal *omission*, or a series of il *omissions*; or, to use the words of Mr. Bentham "we give the name of *offen* every act which we think ought to be prohibited by reason of some evil whi produces or tends to produce".

'Punishable' must mean that the commission or omission of the act, commission or omission of which is prohibited, renders the person who com or omits it liable to the sanction of the law, i.e., to punishment[3]. This wor "here used according to a common idiom for 'rendering a person liable to pu ment'; for it is obvious that in the strict and primary usage of the word, no t is punishable and no person since Xerxes, except a child with his doll, has supposed otherwise. The expression, therefore, is incomplete"[4]. The w 'made punishable' must be interpreted as meaning recognized as or "decl punishable"[5]. 'A thing made punishable' is no doubt an inaccurate express but 'punishable' is here used in a sense which is popularly familiar in the ex] sion "a punishable offence", that is, "an offence to which a punishment is attach and the words 'a thing made punishable' mean an act or omission; which by Code is constituted one to which a punishment is attached[6].

Order under s. 55 of the Criminal Procedure Code.—Such an order does come within the definition of an offence[7].

Maintenance order.—An order for payment of maintenance is not a viction for an offence[8].

Proceeding under s. 28 of the Public Conveyances Act.—A proceedin; recover legal fare under s. 28 of the Bombay Public Conveyances Act 1867, is a complaint of an offence[9].

Attempt.—An attempt to commit an offence is itself an offence wi the definition of 'offence' as given in this section; and where no express prov: is made in any other part of the Code for the punishment of such offence, : punishable under s. 511[10].

Abetment.—The abetment of an offence is in itself an offence within meaning of this section[11].

Amendment.—This section was substituted for the original s. 40 by XXVII of 1870, s. 2. The figures 64, 65, 66 and 71 were inserted by Act VII 1882, s. 1; and the figure 67 by Act X of 1886, s. 21. The term 'offence' is t in certain cases, extended to things (made punishable under any special or l law. But nothing contained in the amending Act XXVII of 1870 is to be take affect any of the provisions of any special or local law (s. 15). The word, figure letter ' Chapter V-A' were inserted by Act VIII of 1913.

1 (1881) 5 Bom. 338, 353.
2 Per Collett, J., (1866) 3 M. H. C. App. 11, 17.
3 Per Duthoit, J., in *Kandhaia*, (1884) 7 All. 67, 71.
4 Per Holloway, J., (1866) 3 M. H. C. App. 11, 12.
5 Per Collett, J., in *ibid*, 15.
6 Per Innes, J., in *ibid*, 20, 21.
7 *Kandhaia*, (1884) 7 All. 67, 69; *S Churn Napit*, (1882) 8 Cal. 331.
8 *Poonammal*, (1892) 16 Mad. 234; *G Hossain Chowdhry*, (1867) 7 W. R. (Cr.) *Thaku bin Ira*, (1868) 5 B. H. C. (Cr. C.) !
9 *Valli Mitha*, (1919) 22 Bom. L. R. 19: Bom. 463.
10 *Ajudhia*, (1895) 17 All. 120.
11 *Spier*, (1897) P. R. No. 49 of 1887

"Special law". **41.** A "special law" is a law applicable to a particular subject

COMMENT.

Whenever there is an intention to apply the provisions of the criminal law *to acts authorized or required by particular statutes, that intention* is always made clear by express words to that effect, e g, the Income-tax Act[1], the Land Acquisition Act[2], etc [3]

The special laws contemplated in s 40 and this section are only laws, such [illegible] is, the no sh

"Local law" **42.** A "local law" is a law applicable only to a particular part of British India.

COMMENT.

Laws applicable to particular localities are termed local laws, e g, Port Trust Acts A local law does not necessarily include all rules made under the provisions of a local law[5] Where a local law declares a breach of the rules made under its authority to be punishable then a breach of such rules might constitute an offence within the meaning of s 40 of the Code[6]

"Illegal". "Legally bound to do". **43** The w [illegible] which is [illegible] or which [illegible] a person is said to be "legally bound to do" whatever it is illegal in him to omit.

COMMENT.

The word "illegal' has been given a very wide meaning as it includes (1) everything which is an offence, (2) everything which is prohibited by law and (3) everything which furnishes ground for a civil action The prohibition in the second case must be *legal* The accused submitted to his official superior a false 'nil' return of lands in his enjoyment, and also made a false statement to the same effect in a revenue inquiry It was held that no offence had been committed as the act of the accused was not 'illegal'[7] He was doubtless guilty of a breach of a departmental order, but [illegible] within the meaning of this [illegible] his superior to be at his offic [illegible] that purpose he falsely enters his arrival at 10 when he in fact arrived at 11 o'clock can it be said that he has committed an offence? Certainly not A breach of a departmental order is not a criminal offence

The words 'illegal' and 'unlawful' have the same meaning under the Code[8]

[1] II of 1887, ss 35, 37

[2] I of 1894 s 10

[3] *Chandi Pershad v Abdur Rahman*, (1894) 22 Cal 131, 139

[4] *Po Han* (1913) 7 L. B R 63

[5] *Gandi Shah* (1894) P R No 23 of 1894, *Ma Khwet Kyi*, (1928) 6 Ran 701

[6] *Ma Khwet Kyi*, sup

[7] *Appayya* (1891) 14 Mad 484 *Ramasami Mudali* (1881) 4 Mad 141, dissented from.

[8] See 1st Rep., s 628

1. **'Which furnishes ground for a civil action'.**—"These appear wide ...rds, but we think it would be difficult to restrict them without the risk of ex...ding something that ought to be included. Generally we apprehend it will be ...nd unobjectionable to designate as illegal any thing done or omitted to be done ...a man for which he is liable to a civil action.[1]"

'Injury".

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property[1].

COMMENT.

"Injury" is an act contrary to law[2]. Thus an unlawful detention of a ...rt at a toll-gate caused by an illegal demand for payment of toll amounts to ...ury[3]. Threat of a decree which can never be given effect to is a threat of harm ...an individual in his person, reputation, or property[4]. The word 'injury' has ...en given a wide meaning in this section. It will include every tortious act.

1. **'Property'.**—This word here means something in existence and it cannot, ...th any propriety, be applied to the reasonable expectation of pecuniary benefit ...the loss of which an action is maintainable by the representatives of a deceased ...rson[5]. Where the accused took away the complainant's cattle and declined to ...ease them until he was paid a certain sum and on the receipt of that sum he ...eased them, it was held that he caused 'injury' to the complainant[6].

Death of husband is not an 'injury' to wife.—A Magistrate imposed a ...e in addition to a sentence of imprisonment on a conviction for the offence of ...using death by a rash and negligent act and gave compensation to the widow of ...e deceased out of the fine imposed. It was held that compensation could not ...given to her for she did not suffer any injury as here defined[7]. The Court said: ...f the claim of the widow in such a case as the present is maintainable, it must ...low that the master of a servant, who has been disabled or put in wrongful ...nfinement, may equally apply for compensation to be paid out of the fine in...cted on the offender". It may, however, be argued that nothing could be more ...rmful to the mind of a woman than the death of her husband and the section ...eaks of harm to the mind as 'injury'. And it was held by the former Chief Court ...the Punjab that loss of her husband's support affected a widow prejudicially in ...legal right, and was therefore an injury as defined in the Penal Code[8].

'False charge is an injury.'—A false charge laid before the Police, and ...ver intended to be prosecuted in a Court, may subject the accused to very sub...ntial injury, as here defined[9].

'Life".

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

'Death".

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

1 1st Rep., s. 91.
2 *Svami Nayudu* v. *Subramania Mudali*, ...64) 2 M. H. C. 158.
3 *Appalasami*, (1892) 1 Weir 441.
4 *Priyanath Gupta* v. *Laljhi Chowkidar*, ...923) 27 C. W. N. 479.
5 *Yalla Gangulu* v. *Mamidi Dali*, (1897) ...Mad. 74, 76, F. B.
6 *Habibul Razzak*, (1923) 21 A. L. J. 850.
7 *Yalla Gangulu* v. *Mamidi Dali*, sup.; *Lutchmaka*, (1889) 12 Mad. 352; *Abdul Rahiman*, (1895) Cr. R. No. 26 of 1895, Unrep. Cr. C. 763.
8 *Saif Ali*, (1898) P. R. No. 17 of 1898, F.B.
9 *Ashrof Ali*, (1879) 5 Cal. 281, 282.

"Animal" **47.** The word "animal" denotes any living creature, other than a human being.

COMMENT.

This definition is, according to Sir James Stephen, not only superfluous but of doubtful correctness It will include an angel, frog spawn, and probably a tree

"Vessel" **48** The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

49 Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar

"Year" "Month"

COMMENT.

A year is the time wherein the sun goes around his compass through the twelve signs, or the period in which the revolution of the earth round the sun is completed, viz, 365 days, 5 hours, 48 minutes, and 51 6 seconds For ordinary purposes the average length of a year is taken to be 365 days But every fourth year the extra hours are taken into account and the statute 24 Geo II, c 25, enacts that the year shall consist of 366 days The fourth year is called the leap year By statute 21 Hen III, the increasing day in the leap year, as well as the preceding day, are counted for one day only The 1st January is the first day of the year by statute 24 Geo II, c 23, before that enactment the 25th March was the first day of the year

The day on which a sentence is passed on a prisoner is calculated as a whole day. A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect[1] On the 31st October the prisoner was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days commencing after the expiration of the calendar month Pursuant to his sentence, he was detained in custody until the 14th of December It was held that the detention was *lawful, for as the calendar month did not expire until the 30th of* [illegible] mprison- ber had [illegible] sonment for one calendar month, passed on any given day of any given month, is to be held [illegible] the last moment of its last day, but as long as there is a day in the calendar numerically corresponding from which the sentence begins to run, so that it is unnecessary to trench upon the succeeding month, I see no ground for anticipating the expiration of the sentence'[2]

1 *Migotti v Colvill* (1879) 4 C P D 233. 2 *Ibid* p 236.

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

'Section".

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before public servant or to be used for the purpose of proof, whether a Court of Justice or not.

'Oath".

COMMENT.

An 'oath' is a religious asseveration, by which a person renounces the rcy, and imprecates the vengeance of Heaven if he do not speak the truth[1].

The Indian Oaths Act substitutes affirmation for an oath in the case of Hindus d Mahomedans. If oath is objected to then affirmation is admissible in other ses[2].

52. Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

'Good faith".

COMMENT.

The definition of good faith given here is merely a negative one. It does t define 'good faith'. It says that an act is only done in good faith if it is done with due care and attention.

According to the General Clauses Act[3] "A thing shall be deemed to be ne in 'good faith' where it is in fact done honestly whether it is done negligently not". This definition is borrowed from an English statute[4] and it differs terially from that contained in this section. Under the definition given here question of honesty is immaterial.

Good faith requires not logical infallibility, but due care and attention. t how far erroneous actions or statements are to be imputed to want of due care d caution must, in each case, be considered with reference to the general cirmstances and the capacity and intelligence of the person, whose conduct is in estion[5].

The question of good faith must be considered with reference to the position the accused and the circumstances under which he acted. The law does not act the same care and attention from all persons regardless of the position they cupy[6].

Where a police constable after questioning a person, who was carrying three ndles of cloth under his arms, and receiving unsatisfactory replies, arrested n, it was held that the putting of questions, not for the purpose of causing noyance, but in order to clear up his suspicions, was an indication of good faith[7]. police-officer, seeing a horse, resembling one which his father had lost a short

1 *White*, (1786) 1 Leach 430.

2 Act X of 1873, s. 6

3 X of 1897, s. 3 (20).

4 The definition corresponds exactly with 90 of the Bills of Exchange Act, 1882, 45 & Vic., c. 61, which is founded on the distinction pointed out in *Jones* v. *Gordon*, (1877) 47 J. Bank, 1, 2 App. Cas. 616, by Lord Blackm, between the case of a person who was nestly blundering and careless, and the e of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the transaction was a valid one, and that he was dealing with a good Bill. The sale of Goods Act, 1893 (56 & 57 Vic., c. 71), s. 62, gives a similar definition.

5 *Abdool Wadood Ahmed*, (1907) 9 Bom. L. R. 230, 31 Bom. 293.

6 *Bhawoo Jivaji* v. *Mulji Dayal*, (1888) 12 Bom. 377, 393.

7 *Ibid.*

time previously, tied up in B s premises, jumped at once to the conclusion that B had either stolen the horse himself, or had purchased it from the thief He found that B had bought the animal from one S, so he sent for S and charged him with the theft without taking the trouble of getting any credible information as to whether it was his father's horse or not It was held that he had acted without exercising due care and attention[1] The accused who was an educated man living in a town where medical attendance was available, chained up his brother, who was subject to fits of violent insanity with lucid intervals for over three months in an unnecessarily cruel way, it was held that he did not act with due care and attention[2]

Mere good faith in the sense of simple belief, actual belief with any grounds for believing is not sufficient the belief must be a reasonable not an absurd, belief that is there must be some reasonable ground for it Good faith in act or belief requires due care and attention to the matter in hand The law cannot mark except in this vague way the amount of care and attention requisite but if a man takes upon himself an office or duty requiring skill or care, and a question arises whether he has acted therein in good faith, he must show not merely a good intention, but such care and skill as the duty reasonably demands for its due discharge The degree of care requisite will vary with the degree of danger which may result from the want of care Where the peril is the greatest the greatest caution is necessary[3]

Where a person, uneducated in matters of surgery operated on a man for internal piles by cutting them out with an ordinary knife and the man died from hæmorrhage it was held that he had not acted in good faith although he had performed similar operations on previous occasions[4]

S[illegible] each act Wh[illegible]

act[5]

[1] *Sheo Surun Sahai* v *Mohond Fa[illegible] Khan* (1838) 10 W R (Cr) 20
[2] *Sh[illegible] Narai[illegible]* (1923) 21 A L J 391
[3] M & M
[4] *S[illegible] Karoo Kobiraj* (1887) 14 Cal 566
[5] *Hayat* (1887) I R No 11 of 1888

CHAPTER III.

OF PUNISHMENTS.

Punishments.

53. The punishments to which offenders are liable under the provisions of this Code are,—

First,—Death;

Secondly,—Transportation;

Thirdly,—Penal servitude;

Fourthly,—Imprisonment, which is of two descriptions, namely:—

(1) Rigorous, that is, with hard labour.

(2) Simple.

Fifthly,—Forfeiture of property;

Sixthly,—Fine.

COMMENT.

"The determination of the right measure of punishment is often a point of great difficulty. Hard-and-fast rules cannot be laid down, but the decision must be left to discretion, and discretion has to be guided by a variety of considerations.

There is the element of vindictiveness, which cannot be left out of sight, notwithstanding what has been said by Plato on the subject. Both personal and public sentiment demand that the person who has made other suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts have nothing to do. Their concern is solely with the nature of the act viewed as a crime or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

The principal object of punishment, however, is the prevention of offences, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another.

It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community"[1].

The causing of merely retributive harm, whether by the community or the individual, is itself a crime. Punishment is in itself an evil, justified only by its effects in deterring the offender from a repetition of the offence and in deterring others by the example from the commission of it. In each case punishment must be the least that will produce both these effects[2]. Courts should exercise discretion in making the penalty fit the crime. The practice of committing petty offenders to the Sessions Court after three or four convictions should cease[3].

To the six kinds of punishments mentioned in the section two more are added by subsequent enactments, viz., whipping and detention in reformatories.

1 Per Burgess, J. C., in *Nga Ku*, (1897) 1 U. B. R. (1897-1901) 330, 335.

2 *Nanhi Gond*, (1926) 28 Cr. L. J. 493.

3 *Gala Mana*, (1924) 26 Bom. L. R. 434.

In the Madras Presidency the punishment of stocks is inflicted on offenders of lower castes[1]

An order under s 562, Criminal Procedure Code, directing release upon probation of good conduct cannot be said to be a punishment[2]

1. Death.—The authors of the Code say "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed .. To the great majority of mankind nothing is so dear as life And we are of opinion that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life Those offences are almost always committed under such circumstances that the offender has it in his [illegible]

If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive A law which imprisons for rape and robbery, and hangs for murder holds out to [illegible]

Death is the punishment that must be awarded for murder by a person under sentence of transportation (s 303) It may be awarded as punishment for [illegible] war against the King (s 121) (2) Abett [illegible] (3) Giving or fabricating false evidence [illegible] death (s 194) (4) Murder (s 302) (5) Abetment of suicide of a minor or insane, or intoxicated person (s 305) (6) Dacoity accompanied with murder (s 396) (7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s 307)

2. Transportation.—The authors of the Code observe "The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the Natives of India, particularly by those who live at a distance from the sea, with peculiar fear The pain which is caused by punishment is unmixed evil It is by the terror which it inspires that it produces good, and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country Prolonged imprisonment may be more painful in the actual endurance, but it is not so much dreaded beforehand, nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as a sentence of exile beyond what they call the Black Water This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict The separation resembles that which takes place at the moment of death The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the Natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return It is natural that his fate should impress them with a deep feeling of terror It is on this feeling that the efficacy of the punishment depends, and this *feeling would be greatly weakened if transported* convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends"[4].

[1] Mad Reg XI of 1816 s 10
[2] *Baba Tamboli* (1923) 22 N L R 166.
[3] Note A p. 93.
[4] *Ibid*, p 94

intentional omission to assist public servant when bound by law to give assistance (ss. 175, 176, 187).

(4) Refusing oath when duly required to take by a public servant; or refusing to answer a public servant authorized to question; or refusing to sign any statement made by a person himself before a public servant (ss. 178, 179, 180).

(5) Disobedience to an order duly promulgated by a public servant (s. 188).

(6) Escape from confinement negligently suffered by a public servant; or negligent omission to apprehend, or negligent sufferance of escape, on the part of a public servant in cases not otherwise provided for (ss. 223, 225-A).

(7) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (s. 228).

(8) Continuance of nuisance after injunction to discontinue (s. 291).

(9) Wrongful restraint (s. 311).

(10) Defamation; printing or selling defamatory matter known to be so (ss. 500, 501, 502).

(11) Uttering any word, or making any sound or gesture, with an intention to insult the modesty of a woman (s. 509).

(12) Misconduct in a public place by a drunken person (s. 510).

5. **Forfeiture.**—Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences. It could also be inflicted on persons guilty of offences punishable with death. It has now been abolished by Act XVI of 1921.

In England this punishment was abolished by 33 & 34 Vic., c. 23, s. 1. In America too it was done away with.

Forfeiture of specific property is still retained as a punishment in the following cases:—

(1) Whoever commits, or prepares to commit, depredation on the territories of any power at peace with the King, shall be liable, in addition to other punishments, to forfeiture of any property used, or intended to be used, in depredation, or acquired thereby (s. 126).

(2) Whoever knowingly receives property taken as above mentioned or in waging war against any Asiatic power at peace with the King, shall be liable to forfeit such property (s. 127).

(3) A public servant, who improperly purchases property, which, by virtue of his office, he is legally prohibited from purchasing, forfeits such property (s. 169).

6. **Fine.**—"Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich zemindar...Punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of... forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought...to be so fined as to reduce him to poverty"[1].

Fine is the only punishment in the following cases:—

(1) Unlimited—

(*a*) The person for whose benefit a riot has been committed, not having duly endeavoured to prevent it (s. 155).

[1] Note A, pp. 97, 98.

(b) The agent or manager of such person under the like circumstances (s 156)

(c) False statement in connection with an election (s 171 G)

(2) Limited to Rs 1,000—

(a) The owner or occupier of land on which a riot or unlawful assembly is held, and any person having or claiming any interest in such land, and not using *all lawful means to prevent such riot or unlawful* assembly, is punishable with fine not exceeding Rs 1,000 (s 154)

(b) Whoever publishes any proposal to pay any sum or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any e
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shall be punished

(3) Limited to Rs 500—

(a) A person in charge of a merchant vessel, negligently allowing a deserter from the Army, Navy or Air Force to obtain concealment in such vessel is liable to a fine not exceeding Rs 500 (s 137)

(b) Voluntarily vitiating the atmosphere so as to render it noxious to the public health, is punishable with a fine of Rs 500 (s 278)

(c) Illegal payment in connection with an election (s 171-H)

(d) Failure to keep election accounts (s 171-I)

(4) Limited to Rs 200—

(a) Offences relating to fictitious stamps (s 263 A)

(b) Obstructing a public way or line of navigation, is punishable with fine not exceeding Rs 200 (s 283)

(c) Committing of a public nuisance, not otherwise punishable, is punishable with fine not exceeding Rs 200 (s 290)

When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any of them, and, if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent[1]

7. Whipping.—This form of punishment is added by the Whipping Act[2] under which offenders are liable to whipping—

(a) As an alternative punishment when offences under ss 378, 380, 382, 443, 444, 445, and 446 of the Penal Code are committed

(b) As an alternative or additional punishment when offences under *ss 375, 377, 390 and 391 of the Penal Code are committed*

(c) When they are juvenile offenders and commit certain offences specified in s 5 of the Whipping Act

It should be employed at the discretion of the Judge in all cases in which the offence involves cruelty in the way of inflicting pain, or in which the offender's motive is lust The man who cruelly inflicts pain on another should be made to feel what it is like The man who gratifies his own passions at the expense of a cruel and humiliating insult inflicted on another should be himself shamefully and painfully humiliated

Whipping should be inflicted in cases where there is a certain amount of aggravation in the commission of the offence[3].

[1] *Ratnagiri Magistrate's Letter*, (1875) Un rep Cr C 90

[2] Act IV of 1909 See the Appendix where it is set out in full In Upper Burma, see the Burma Laws Act (XIII of 1898) s 3 (b) and the second Schedule, in the Punjab Frontier Districts in the North West Frontier Province and Baluchistan see the Punjab Frontier Crimes Regulation (III of 1901), ss. 6 and 12 (2)

[3] *Badri Prasad*, (1922)

Concurrent sentences of whipping are illegal[1].

In France, Germany, and the United States corporal punishment has been abolished.

8. **Detention in Reformatories.**—Juvenile offenders sentenced to transportation or imprisonment may be detained in a Reformatory School for a period of three to seven years[2]. See the Madras Borstal Schools Act, Mad. Act V of 1926.

PRACTICE.

Procedure.—Death.—When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead[3]. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary[4]. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life[5].

Transportation.—No sentence of transportation shall specify the place to which the person sentenced is to be transported[6]. The Governor-General in Council is empowered to fix places in British India to which persons sentenced to transportation may be sent. It is the duty of the local Government to make arrangements for the removal of such person[7].

Punjab Circular.—Sessions Judges, when passing sentences of transportation for life, should enter on the warrant of commitment, for the information of the Jail authorities, a note showing whether the prisoner sentenced comes under one or other of the following five classes:—

(1) Dacoits.
(2) Thags.
(3) Robbers who administer poisonous drugs.
(4) Professionals.
(5) Hereditary Criminals.

This information is required to enable the Jail authorities to classify life-prisoners under the rules regulating the mark system and the remission of sentences of convicts. For the purposes of those rules Professionals (class 4) have been defined by the Local Government as prisoners against whom there is a record of more than two convictions, and Hereditary Criminals (class 5) as prisoners belonging to a tribe declared criminal under the provisions of Act III of 1911[8].

Imprisonment.—A sentence of imprisonment cannot be suspended to take effect at a future period, but must commence from the time that the sentence is passed. Where a Deputy Magistrate postponed the execution of a sentence of imprisonment for a stated period at the request of the accused, to allow him to appeal, it was held that the sentence was bad in law and could not be carried into execution[9].

Bombay Circulars.—The Honourable the Chief Justice and Judges have had under consideration the question of the proper treatment of young or adolescent criminals, *and they desire to impress upon all Magistrates the necessity of* making themselves fully acquainted with the powers which they possess by law to deal suitably with such cases.

1 *Eng. Gyaung*, (1911) 6 L. B. R. 22.
2 See Act VIII of 1897, s. 8.
3 Criminal Procedure Code, s. 368 (1)
4 *Ibid*, s. 381.
5 *Ibid*, s. 382.
6 *Ibid*, s. 368 (2).
7 Section 33 of the Prisoners Act V of 1871 as substituted by s. 2 of Act IX of 1882.
8 L. H. C. R. & O., Vol. IV., p. 115.
9 *Kishen Soonder Bhuttacharjee*, (1869) 12 W. R. (Cr.) 47.

(2)
Procedure
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562, no definite limit of age is imposed The Reformatory Schools Act is applicable in the case of male offenders under fifteen years of age, or, in the special case of section 31, to offenders of either sex under fifteen years of age But that limit of age has been raised to sixteen years in places to which the Bombay Children Act has been applied Those places are at present the City of Bombay and the Municipal Borough of Lonavla. The Bombay Children Act applies to children under fourteen years of age or young persons between the ages of fourteen and sixteen The Whipping Act deals both with adult male offenders and with male offenders under sixteen years of age

(3) In the majority of these cases short sentences of imprisonment are undesirable and should not be inflicted unless special reasons exist for doing so Magistrates should therefore consider carefully whether the case falls within the provisions of section 562 of the Code of Criminal Procedure, or section 31 of the Reformatory Schools Act, and if so whether the procedure laid down by those sections is not appropriate If the Magistrate feels that the case cannot properly be dealt with under those sections and that a sentence of fine is inappropriate he should then consider whether section 2 of the Whipping Act, 1909, or, in the case of juvenile offenders, that section or section 5 does not furnish a suitable penalty, or whether it may not be better to have recourse to sections 8 and 9 of the Reformatory Schools Act In places where the Bombay Children Act, 1924, is in force, and no Children's Court has been constituted, the provisions of that Act should also be remembered[1]

When any person serving in the Military Department is convicted in a criminal Court, such Court shall inform the Officer Commanding the Regiment or Corps to which
to imprisonment in a
crimin
ithout delay, to the Controller of Military Accounts of the Circle to which the pensioner belongs[3]

When a reservist of the Native Army is sentenced by a criminal Court to transportation or imprisonment for any term exceeding three months, the facts of the case should be reported, without delay, by such Court to the Adjutant-General in India (vide Bom Gov Gaz for 1895, Part I, p 853)[4]

Patna Circular.—(a) Sessions Judges and Magistrates will forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a criminal Court

(b) In the case of a reservist of the Native Army who may be sentenced by a criminal Court to transportation or imprisonment for any term exceeding three months, a report should be made to the Adjutant General, India (Home Department letter No 220, Judicial, dated 18th—25th February 1910)[5].

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of cases no other method of punishment than a short term of imprisonment can be imposed and although it is not desired to infringe in any way upon the discretionary powers possessed by Magistrates in sentencing offenders, upon Magistrates are impressed the evils arising from sentencing offenders to short terms of impris-on-

[1] B. H. C. Cr C. Ch V, s. 93 B.
[2] Ibid s. 97, p 60
[3] Ibid s 98, p 60
[4] Ibid, s. 99, p. 60
[5] Pat. H. C. Cr C., para. 59 p. 22.

ment. As the moral effect of prison life is generally bad while the associations are degrading and the loss of character and self-respect involved in even the shortest term of incarceration is difficult to recover and often tends to create a criminal, other orders, such as the imposing of a fine or whipping, the taking of security under s. 562, Code of Criminal Procedure, or the allowing of offenders under s. 388 to collect the amount of the fines imposed upon them, may suitably be passed. Second and Third Class Magistrates should make use of the provisions of s. 349 by sending the accused before the District Magistrate or the Sub-Divisional Magistrate to receive a punishment different in kind from or more severe than that which can be imposed by them[1].

To assist the Courts in deciding when sentences of simple imprisonment may fitly be passed, the following orders of the Government of India are reproduced:—

"It has been brought to notice that in one province at least it is a common practice for the Courts to pass a sentence of simple imprisonment, not because a minor degree of moral turpitude is involved in the crime committed, but in view of the prisoner's presumed unfitness for labour. The Government of India believe that it is not the practice for the Courts to take into consideration any question of the physical fitness of a convict to labour. It is for the jail authorities to ascertain what labour is appropriate to a prisoner's strength and to put him to that only; the Courts have merely to consider the amount and nature of the imprisonment appropriate to the offence, and the character and status of the offender, and they should realize that by selecting simple instead of rigorous imprisonment they make a very essential difference in the way in which a prisoner will be treated on his admission to jail"[2].

Fine.—A sentence of fine where more prisoners than one prisoner are punished by fine must define by a specific sum the individual liability of each prisoner[3].

Whipping—As to the mode of executing this sentence, see ss. 390-396 of the Code of Criminal Procedure.

Commutation of sentence of death.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

COMMENT.

See the observations of the authors of the Code set out under the next section. This section empowers the Government to commute the sentence of death "for any other punishment provided by this Code", but s. 402 of the Criminal Procedure Code limits this power as it says that the Governor-General in Council or the Local Government may, without the consent of the persons sentenced, commute any one of the following sentences for any other mentioned after it:— death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

1 L. B. C. M. Vol. I, s. 283, p. 80.

2 Home Department Resolution No. 4. (Jails, 183-194, dated 4th April 1839; L. B. C. M., Vol. I, s. 285, p. 80.

3 5 M. H. C. App. 5; 1 Weir 30.

Postponement of capital sentence on a pregnant woman.—Section 382 of the Criminal Procedure Code says "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life"

Commutation of sentence of transportation for life

55. In every case in which sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

COMMENT.

The authors of the Code say "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect The state of those remote provinces of the Empire in which convict settlements are established and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide"[1]

PRACTICE.

Procedure.—See ss 401 and 402 of the Criminal Procedure Code which provide for suspensions, remissions, and commutations of sentences

Sentence of Europeans and Americans to penal servitude

56. Whenever any person being an European[1] or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude instead of transportation according to the provisions of Act XXIV of 1855:

Proviso as to sentence for term exceeding ten years, but not for life

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

COMMENT.

The punishment of penal servitude is only applicable to Europeans and Americans[2]

[1] N to A, p 95

[2] *Dema Baidyi*, (1896) 19 Mad 483.

I. 'European'.—This word, as used in Act XXIV of 1855, shall be understood to include any person usually designated an European British subject (s. 15). 'European British subject' means (i) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British islands or any colony, or (ii) any subject of His Majesty who is the child or grand-child of any such person by legitimate descent[1].

Proviso.—This was added by Act XXVII of 1870, s. 3.

PRACTICE.

Procedure.—For the special procedure for the trial of European British subjects, Europeans or Americans, see the Code of Criminal Procedure, Ch. XXXIII, s. 443, *et seq.*

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment transportation for life shall be reckoned as equivalent to transportation for twenty years.

COMMENT.

For calculating fractions of terms of punishment this section provides that transportation for life shall be reckoned as equivalent to transportation for twenty years. But transportation for life has come to mean for the purpose of duration of the sentence as transportation for twenty years. After the period of twenty years is over the convict may come back if he likes.

Offenders sentenced to transportation how dealt with until transported.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Transportation instead of imprisonment.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards[1], it shall be competent to the Court which sentences[2] such offender, instead of awarding sentence of imprisonment[3], to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment[4].

COMMENT.

Object.—Under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. "At the time when the Penal Code was prepared by the India Law Commissioners, it was a rule of the Court of Directors of the East Indian Company that no native should be sentenced to transportation for a period less than for life, it being the opinion at that time that a native of India, if once transported, should never be allowed to return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as a punishment for any period short of life, and it did not give power to the Government

[1] Criminal Procedure Code, s. 4 (1) (i)

to commute a sentence of imprisonment for seven years into transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth But, when the Penal Code came to be altered, a different rule was thought necessary It was thought reasonable that natives of India as well as Europeans and others should be sentenced to transportation for periods less than for life, and that the reason for not allowing a native, who had once been transported, to return to India, no longer held good, and therefore as the Penal Code as prepared by the Indian Law Commissioners did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact" this section as a general clause[1]

Though this section was introduced when the Bill was before the Council, yet no alteration appears to have been made in the language of the several sections which prescribed transportation as a punishment Thus, in the majority of instances, the words used are —'shall be punished with transportation for life or with imprisonment which *may* extend etc" While the Court has an option in determining the duration of the term of imprisonment it has no option in determining the duration of the term of transportation[2] In no section of the Code which prescribes transportation as a punishment, with the exception of this section and ss 121 A and 124 A, is the language used such as to leave the Court any option regarding the duration of the term

Principle—This section only enacts a general rule to the effect that in the case of offences for which no transportation is specially mentioned as a punishment and which are punishable with imprisonment for a term of seven years or upwards it is competent to the Judge to substitute a sentence of transportation as a substantive sentence for that of imprisonment[3] The term of transportation under it cannot exceed the term of imprisonment provided by the section under which a conviction is had[4] It cannot be less than seven years

Scope—This section "applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years"[5] It necessarily gives powers to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it but it does not intend to give this power to a Court, which could not sentence to imprisonment for that period The section, no doubt, goes out of the ordinary course adopted in other parts of the Code, and instead of defining the punishment gives a certain power to the Court which passes the sentence, to award a different kind of punishment from that specified in the Code[6]

1 **'In every case in which an offender is punishable with imprisonment for a term of seven years or upwards'.**—The punishment awarded for one offence alone must be imprisonment for seven years or upwards It cannot be made up by adding two sentences together and then commuting the amalgamated period to transportation[7] A general sentence of transportation for two or more offences, when only one of the punishments awarded is seven years' imprisonment, is illegal[8]

2 **'It shall be competent to the Court which sentences'.**—That is, it shall be competent to the Court, which has power to sentence the prisoner to imprisonment for a term of seven years or upwards, to sentence him to transportation in

[1] [illegible] — *Budhoo* 1868 [illegible]

[7] *Prem Chund Oswal* (1864) W R (Gap) [illegible]

[5] Per Macpherson J, in *Budhoo* (1868) 9 W R (Cr) 6, 7

[6] Per Peacock, C J, in *ibid* p 10

stead of imprisonment. If the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, then it has also jurisdiction, under this section, to pass a sentence of transportation for seven years[1].

3. **'Instead of awarding sentence of imprisonment'.**—The proper procedure is to pass a sentence of imprisonment for the term fixed by law for the particular offence and then, under this section, direct that the prisoner be transported for that period[2]. The Court may, in passing sentence for the offence, commute the imprisonment to transportation; but it cannot commute the sentence after the sentence of imprisonment has been passed[3].

4. **'Transportation for a term not less than seven years, and not exceeding...imprisonment'.**—A transportation awarded under this section cannot exceed the imprisonment for which the prisoner might have been sentenced, even though it would have been open to the Court to award a longer period of transportation under the section appropriate to the crime. Thus, where the law gives the alternative punishments of death, transportation for life, and rigorous imprisonment extending to ten years, and the Court does not inflict the extreme penalty, it cannot award more than ten years' transportation[4]. When an offence is punishable with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years. Where, therefore, the accused, on conviction for an offence under s. 395 was sentenced to transportation for fifteen years, the High Court reduced the sentence to transportation for a term of ten years, that being the period of imprisonment provided for the offence[5]. No sentence of transportation for a shorter period than seven years can be passed on any charge[6]. Where the accused was convicted on separate charges of giving false evidence in a judicial proceeding under s. 193 and of forgery under s. 467, and sentenced to seven years' transportation for the first offence, and a further period of transportation for three years for the second offence, the second conviction was quashed as illegal[7].

Where the accused was convicted of an attempt to commit rape and sentenced, under this section, to seven years' transportation, the sentence was set aside on the ground that as rape was only punishable with ten years' imprisonment under s. 511 only five years' imprisonment could be awarded for an attempt to commit such an offence. At the same time it was held that as rape was punishable with transportation for life—transportation for twenty years (s. 57)—the sentence of seven years' transportation being less than one half of twenty years would have been legal if passed independently of this section[8].

Sentence under a special or local law.—The section does not apply to sentences under a special or local law and transportation cannot, therefore, be ordered in the case of offences punishable under such law[9].

Transportation cannot be substituted for imprisonment in default of fine.—This section does not authorise the substitution of transportation for

[1] *Boodhooa,* (1868) 9 W. R. (Cr.) 6, 8, 11; *Nuran,* (1880) P. R. No. 17 of 1880.

[2] *Rughoo,* (1864) W. R. (Gap. No.) (Cr.) 30.

[3] *Prem Chund Ousowal,* (1864) W. R. (Gap. No.) (Cr.) 35.

[4] *Rughoo,* sup; *Keifa Singh,* (1865) 3 W. R. (Cr.) 16; *Mohanundo Bhundary,* (1866) 5 W. R. (Cr.) 16; *Joseph Meriam,* (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10; *Naiada,* (1875) 1 All. 43, F.B.; *Arura,* (1903) P. R. No. 31 of 1903; *Muhammad Sharif,* (1915) P. R. No. 14 of 1915; *Sayyapureddi Chinnayya Dhora,* (1920) 48 I. A. 35, 23 Bom. L. R. 705, 6 Bom. Cr. C. 58.

[5] *Alla-Ud-Din,* (1919) 20 Cr. L. J. 561.

[6] *Gour Chunder Roy,* (1867) 8 W. R. (Cr.) 2; *San Da,* (1906) 4 L. B. R. 65.

[7] *Gour Chunder Roy, ibid.* See to the same effect *San Da,* sup., where a sentence of three years' transportation was passed under s. 440 of the Penal Code but was held to be illegal.

[8] *Joseph Meriam,* (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10.

[9] *Muthuramalingam,* (1901) 11 M. L. J. 127, 1 Weir 30.

the imprisonment to which a Court can sentence an offender in default of payment of fine[1]

PRACTICE

Procedure —In commuting a sentence of imprisonment to one of transportation, s 35, Criminal Procedure Code, must be read together with the sections of the Penal Code, which prescribe the limits of punishment for different offences[2]

The Lahore Rule —Section 59 of the Indian Penal Code empowers Courts to award transportation instead of imprisonment in cases in which offenders are punishable with imprisonment for a term of seven years or upwards, and Sessions Judges and Magistrates of districts exercising enhanced powers, are informed that, in order to bring this section into operation, the punishment awarded for one offence alone must be seven years or upwards The term of seven years cannot be made up by adding two sentences together and then commuting the amalgamated period of imprisonment to one of transportation The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that under s 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous as the case may be[3]

Bengal Rule —The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under s 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be[4]

The Central Provinces Circular —When term transportation is allowed Sessions Judges and Magistrates with special powers should pass term sentences of transportation in cases in which such sentence may legally and suitably be passed The correct procedure is to sentence the offender to transportation under the section under which the offence is punishable read with s 59 of the Indian Penal Code[5].

Burma Rule —When a sentence of seven years or more is necessary, it is usually desirable that the sentence should be one of transportation, not of imprisonment, in which case s 59 of the Penal Code should be quoted in the finding unless the sentence be for life[6]

A certain number of term-convicts are annually transported from Burma It is therefore, expedient in most cases to leave it to the jail authorities to decide whether a particular convict shall be transported or not, and this can best be done

. . . . should run thus —' The Court directs, 59 of the Indian Penal Code, that the said——be ' (sentence)

60 In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple

[1] *Kunhussa* (1882) 5 Mad 28, *Auran* (1880) P J No 17 of 1880, *Yusuf* (1882) 2 A. W N 116, *Nga Tha Zir* (1902) 1 L. B P 292 overruling *Nga Shwe Lan*, (1898) P J L. B 482

[2] *Nga Po Seik* (1898) P J L. B 478.

[3] L. H. C R & O, Vol 2 p 135

[4] C. H. C. I. & O, Vol I Ch I r 61 p 23 See *Raghoo* (1864) W P (Gap No) (Cr) 30

[5] C. I Cr C No 23 (4), p 37

[6] L. B C. M., Vol I, s 289 p 81

[7] L. B. C. M, Vol) p 8

COMMENT.

As to the application of ss. 60 and 63-74 to sentences passed in the Punjab Frontier District, in the North-West Frontier Province, or in Baluchistan, see the Frontier Crimes Regulation[1].

As to the application of ss. 60, 63, 64, 65, 68 and 74 to the Sindh Frontier, see the Sindh Frontier Regulation[2].

61. [*Repealed by Act XVI of 1921*].

62. [*Repealed by Act XVI of 1921*].

Amount of fine.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

COMMENT.

The authors of the Code observe: "It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, and who would not cross a room to avoid it. The number of the poor in every country exceeds in a very great ratio the number of the rich. The number of poor criminals exceeds the number of rich criminals in a still greater ratio. And to the poor criminal it is a matter of absolute indifference whether the fine to which he is liable be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who has laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the Courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able to pay a hundred rupees than to pay a lac. A just and wise judge, even if intrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender to a fine of a hundred rupees. And the limit of a hundred rupees would leave it quite in the power of an unjust or inconsiderate judge to inflict on such an offender all the evil which can be inflicted on him by means of fine.

"It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth[3]".

1 III of 1901, ss. 13 (2), 61.

2 III of 1892, s. 28 (1).

3 Note A, pp. 97, 98.

The description of fine which it was the object of this section to prohibit, was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence[1] The maximum fine to be imposed upon any individual should depend in every case upon his position in life[2]

Magisterial fines —In a Calcutta case it has been doubted whether this section applies to fines inflicted by a Magistrate, as the power of a Magistrate to fine is, in all cases, under the Penal Code and the Criminal Procedure Code limited to Rs 1 000, and it is only the Court of Session and the High Court that can inflict *fines to an unlimited extent*[3]

Statutory application of ss 63 70 —The provisions of ss 63 to 70 apply to all fines imposed under the authority of any Act Regulation, rule or bye law, unless the Act, Regulation, rule or bye law contains an express provision to the contrary[4]

PRACTICE.

Procedure —Whenever a fine is imposed the Court may issue a warrant for levy of fine as provided in the Code of Criminal Procedure[5] The whole or any part of the fine recovered is to be applied—(*a*) in defraying expenses properly incurred in the prosecution, (*b*) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is in the opinion of the Court recoverable by such person in a civil Court, and (*c*) in compensating any bona fide purchaser of property acquired in the commission of certain offences for the loss if such property is restored to its owner[6]

Joint offenders —Where more persons than one are fined on conviction for a joint offence, the sentence must impose a specific fine on each prisoner[7]

Daily fine —An order for payment of a daily fine is illegal as it is an adjudication in respect of an offence which has not been committed when such order is passed[8]

[illegible] regard to the circumstances [illegible] of the offender, and [illegible] limits the term of im [illegible]

1 *Abdoor Ruhman* (1867) 7 W R (Cr) 37, *Mohna* (1895) I R No 20 of 1895

2 *Abd Ilah* (1922) 5 L L J 271

3 *Abdoor Ruhman* sup

4 General Clauses Act X of 1897, s 25 Under s 26 of the Bombay General Clauses Act I of 1904 the provisions of ss 63 70 'apply to every fine imposable under any enactment of the Governor of Bombay in [illegible] Madras Act The United Provinces General Clauses Act (I of 1904) s 25 and the Punjab General Clauses Act (I of 1898) s 23 make ss. 63 70 applicable to all fines under any local Acts The Burma General Clauses Act (I of 1898), s 25, and the Assam General Clauses Act (Assam Act II of 1915) s 28 the Bihar and Orissa General Clauses Act, 1897, and the Central Provinces General Clauses [illegible] (IX of 1874) s 18, to the Ajmere Forest Regulation (X of 1874) s 13.

5 Criminal Procedure Code s 386.

6 *Ibid*, s. 545

7 (1869) 5 M H C App 5, 1 Weir 30

8 *Ram Krishna Pureos* v *Mohendra Nath Mozumdar*, (1900) 27 Cal 560, *Love*, (18[illegible]) 18 W R (Cr) 44, *Ameeruddeen Meha*, (18[illegible]) [illegible]

Burma Rule.—Fines should be regulated on consideration of the means of the offender as well as the gravity of the offence. Excessive fines are prohibited by law and should be carefully avoided[1].

The Central Provinces Circular.—Fines should be regulated so as to accord with the circumstances of the offender and should not under any circumstances be excessive (s. 63 of the Penal Code). Fines are sometimes imposed which are manifestly impossible of realization, while there is reason to fear that many fines which are imposed in petty cases, though realized, are paid only with difficulty. It would appear that in dealing with petty cases some Magistrates fall into a way of fixing the fines at particular amounts as a matter of course, without much thought as to how they will be felt by the particular individual on whom they are imposed. It is a first principle in inflicting this mode of punishment that it is necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. Fines should never in any case be imposed which are not likely to be realized at all, and they should never be imposed in petty cases with such severity as not to be easily realizable[2].

Sentence of imprisonment for non-payment of fine.

64. In every case of an offence[1] punishable with imprisonment as well as fine[2], in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent[3] to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

COMMENT.

Under this section the term of imprisonment in default must not exceed one-fourth of the maximum term of imprisonment fixed for the offence, if the offence is punishable *with imprisonment as well as fine.* This rule applies whether imprisonment is actually awarded or not. It applies to cases where imprisonment or fine, but not both, can be awarded, no less than to cases in which both imprisonment and fine can be imposed. In cases punishable with imprisonment as well as fine, the Court may award, in default of payment of the fine, imprisonment up to the limit of its ordinary powers. For example, in a case of simple theft under s. 379, if fine only is imposed, a Magistrate of the First Class may award, in default of payment, imprisonment for nine months, a Magistrate of the Second Class, imprisonment, for six months, and a Magistrate of the Third Class, imprisonment for one month.

Where a Court passes a sentence of imprisonment and fine, the period of imprisonment awarded in default of payment of the fine cannot exceed one-fourth of the period which the Court has power to impose substantively. Thus, in a case of simple theft a Magistrate of the First Class cannot award more than six months, a Magistrate of the Second Class, more than one month and a half, and a Magistrate of the Third Class, more than one week.

[1] U. B. C. M., s. 121; L. B. C. M., Vol. I, ss. 299, 300, p. 82.

[2] C. P. Cr. C. No. 25, p. 40.

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operation of this section

1. **'Offence'.**—This word here means anything punishable under the Code or any special or local law[2]

2 **'Imprisonment as well as fine'.**—The words 'as well as' do not mean here *and* as will be seen from the concluding words of the first clause, viz, 'whether with or without imprisonment' The words 'imprisonment as well as fine' include (*a*) offences punishable with imprisonment or fine in the alternative and (*b*) offences punishable with imprisonment or fine, or both, cumulatively[3]

3 **'It shall be competent'**—It is not imperative to award a term of imprisonment in default of payment of the fine[4] It is merely permissive

Amendment—The first two clauses of this section were substituted for the words ' in every case in which an offender is sentenced to fine" by Act VIII of 1882, s 2, and the words 'with imprisonment or fine, or' in the second clause were inserted by Act X of 1886, s 21 (2)

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See Frontier Crimes Regulation (III of 1901), s 13 (2) for the application of ss 61 67 of the Code to sentences under s 12 of that Regulation Sections 61 70 apply to all fines imposed under the Garo Hills Regulation (I of 1882), s 5

PRACTICE.

Award of imprisonment in default of payment of fine—Where under a special or local Act passed prior to the enactment of Act I of 1868 a liability to fine or imprisonment, is imposed and a fine is imposed, imprisonment cannot be awarded in default of payment of fine[5]

Imprisonment to be in proportion to the fine—The sentence in default of payment of fine should bear a reasonable proportion to the amount of the fine, regard being had to the circumstances of the convicted person[6].

Limit to imprisonment for non payment of fine when imprisonment and fine awardable

65 The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one fourth of the term of imprisonment which is the maximum fixed for the offence[1], if the offence be punishable with imprisonment as well as fine[2].

1 Per Benson J, in *Iakoob Sahib*, (1898) 22 Mad 238 240

2 Section 40 as amended by Act VIII of 1882 (1866) 3 M H C App 9, 6 M H C. App. 21, 5 M H. C. App. 23, 6 M. H. C App. 40 and (1872) 7 M.H. C. App 12 are thus overruled See *Rappel* (18) 18 Mad. 490

3 *Iakoob Sahib* sup, *Tirumalai* (1891) 1 Weir 31

4 *Beni Pershad*, (1878) P R. No. 30 of 1878 *Anon.*, (1870) 1 Weir 31

5 M H C. R. I, s. 151, see (1871) 6 M H C. App. 40

6 *Nga Cho and Ma Mon*, (1885) S. J L. B 353

COMMENT.

The authors of the Code observe: "The next question which it became our duty to consider was this: when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in gaol, appears to us to be a very objectionable course. The high authority of Mr. Livingston is here against us. He allows the criminal, if sentenced to a fine exceeding one-fourth of his property, to compel the judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds, that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him; the object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe; but it ought not, on the other hand, to call the offender into council with his judges, and to allow him an option between two punishments. In general, the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime. To look out systematically for the most sensitive part of a man's mind, in order that we may not direct our penal sanctions towards that part of his mind, seems an injudicious policy.

"We are far from thinking that the course which we propose is unexceptionable; but it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

"But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the

imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies His person will, indeed, cease to be

ed for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place

"It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine But this harshness is rather apparent than real, if the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment There remains another case, that of an offender who being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid Under both laws imprisonment is inflicted under both a fine is exacted But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in gaol, whether the fine be paid or no The other law keeps him in confinement till the money is actually paid It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person"[1]

Scope —This section does not include punishment inflicted under s 75 of the Code[2] Similarly it does not affect several sections of certain local Acts[3]

1. 'The term shall not exceed one-fourth of the term of imprisonment.. fixed for the offence'.—Where the accused was convicted under s 510 of the Penal Code and sentenced to pay a fine of two annas or in default to

maximum sentence of imprison-

having been found guilty of an

Act (Madras Act III of 1889)

either descrip-

or in default to

imum imprison

days[5]

In the case of an assault (s 352, *infra*) a sentence inflicting a fine of fifty rupees, and awarding imprisonment for one month in default of payment of the fine is illegal[6]

The word 'offence', denotes here anything punishable under the Code or under any special or local law (s 40)

2. 'Punishable with imprisonment as well as fine'.—These words include cases where fine and imprisonment can be awarded and also those where

[1] Note A, pp 98, 99, 100 These views were generally approved of by the Law Commissioners in their 2nd Rep, ss. 489 494

[2] *Alawi* O S C. 175

[3] See Burma Act IV of 1907, s 43 D, Burma Vaccination Act (Burma Act I of 1909) s 15

[4] *Tirumalai* (1891) 1 Weir 31

[5] *Yakoob Sahib*, (1898) 22 Mad 238.

[6] *Jehan Buksh*, (1871) 16 W (Cr.)

the punishment may be either fine or imprisonment but not both. The only cases that it does not apply to are those dealt with in s. 67 where fine only can be awarded[1].

PRACTICE.

Procedure.—In any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine[2]. Section 33 of the Criminal Procedure Code does not authorise a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by this section[3].

Patna Circular.—(I) The Nazir will call upon the prisoner to pay the amount of fine. If the fine be paid in full the person fined should be released unless he be also sentenced to substantive imprisonment. The Nazir will then report the fact to the Court on the foil received by him from the Bench Clerk. If the sentence be one of fine only without any imprisonment in default of payment and the fine be paid in part the prisoner will be released and the Nazir will report the fact on the foil to the Court which passed the sentence in order that a warrant may be issued for the realization of the balance. If the sentence be one of fine only and the fine be not paid at all, the Nazir shall apply for a warrant for the realization of the whole amount and other necessary orders. No person, not also under sentence of imprisonment, alternative or otherwise, shall be detained on account of inability to pay the fine. Where the sentence is one of fine, with or without a term of substantive imprisonment, but with an alternative sentence of imprisonment in default of the payment of the fine, if the fine be not wholly satisfied at once, the Nazir shall report to the Court which imposed the sentence for its orders as to the term of imprisonment proportional to the amount still unpaid which, under s. 69 of the Indian Penal Code, the convicted person has yet to undergo. In such cases the fact of the payment of fine, in whole or in part, should be noted on the warrant of imprisonment by the Magistrate who issues it[4].

Upper Burma Rule.—Section 65 applies whether imprisonment is actually awarded or not. It has been judicially held to apply to cases where imprisonment or fine, but not both, can be awarded, no less than to cases in which both imprisonment and fine can be imposed[5]. Subject to the above rule, in cases punishable with imprisonment as well as fine, the Magistrate may award, in default of payment of a fine, imprisonment up to the limit of his ordinary powers, e.g., in a case of simple theft under s. 379, Indian Penal Code, if fine only is imposed, a Magistrate of the First Class may award, in default of payment, imprisonment for nine months, a Magistrate of the Second Class, imprisonment for six months, and a Magistrate of the Third Class, imprisonment for one month[6]. Where a Magistrate sentences to imprisonment and fine, the period of imprisonment awarded in default of payment of the fine cannot exceed one-fourth of the period which the Magistrate has power to impose substantively. Thus, in this case, a Magistrate of the First Class cannot award more than six months, a Magistrate of the Second Class, more than one month and a half, and a Magistrate of the Third Class, more than one week[7].

1 *Yakoob Sahib,* (1898) 22 Mad. 238, 241; *Nga Myiang Gyi,* (1898) P. J. L. B. 494. See also Comment on s. 64, sup.

2 Criminal Procedure Code, s. 33 (*b*).

3 *Venkatesagadu,* (1887) 10 Mad. 165, F.B., overruling *Muhammad Saib,* (1877) 1 Mad. 277. See *Phoolman Tevary* v. *Satram Ojha,* (1866) 6 W. R. (Cr.) 51; *Darba,* (1877) 1 All. 461, F.B.

4 Pat. H. C. Cr. C., para. 8, p. 144.

5 U. B. C. M., s. 122.

6 *Ibid,* s. 123.

7 *Ibid,* s. 124.

Description of imprisonment for non payment of fine

66 The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence[1]

COMMENT

Imprisonment awarded in default of payment of a fine may be of any kind which may be imposed for the offence

If the offence is punishable with rigorous imprisonment then the additional imprisonment in default of payment of fine must be rigorous[1]

1 **Offence** —This word denotes here anything punishable under the Penal Code or under any special or local law (s 40)

Imprisonment for non payment of fine when offence punishable with fine only

67 If the offence[1] be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple and the term for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale that is to say for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case

COMMENT

Object —This section provides for the maximum term of imprisonment which could be awarded in default of payment of a fine where fine is the only punishment for the offence committed It has no application to offences punishable either with imprisonment or with fine Such sentences are governed by s 65[2]

Its principle is not affected by Ch XXII of the Criminal Procedure Code Section 262 of the Criminal Procedure Code limiting the period of imprisonment in summary trials has no application when the Magistrate acts under this section In summary trials imprisonment exceeding three months cannot be inflicted but if imprisonment is an alternative punishment it can exceed three months[3]

1 **'Offence'** —This word denotes here anything punishable under the Penal Code or under any special or local law (s 40)

Amendment —The words the imprisonment which the Court imposes in default of payment of the fine shall be simple and were inserted by Act VIII of 1882 s 3[4] In the case of hill tribes to which the Kachin Hill Tribes Regulation (I of 1895) is applied the scale of punishment is different see Regulation I of 1895 ss 1 (3) and 3 See also Chin Hills Regulation V of 1896 s 3

Statutory application —Sections 67, 68 and 69 apply to the Madras Harbour Trust Act[5]

PRACTICE

Procedure —The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default

1 S mont Ko il (18[illegible]) 7 W R (Cr) 31

2 Jakoob Sahib (189[illegible]) [illegible] Mad 238. See Chunder Keshal Singh (18[illegible]) 10 W R (Cr) 30

3 Lakyir Ali (1883) 6 All 61

4 See Santa b n Lalhappa Kore (1869) 5 B H C (Cr C) 4[illegible]

5 Mad. Act II of 188[illegible] s

provided that the term is not in excess of the Magistrate's powers under the Criminal Procedure Code (s. 33 (1) (*a*)). It should be noted, however, that s. 33 of the Code of Criminal Procedure does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Penal Code[1].

Thus a Magistrate of the Third Class cannot award imprisonment for more than one month in default of the payment of a fine[2].

Imprisonment to terminate on payment of fine.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

PRACTICE.

Procedure.—Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may (*a*) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender; (*b*) issue a warrant to the Collector of the district authorising him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter: Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so[3]. A warrant issued under cl. (*a*) may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found[4]. When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may (*a*) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and (*b*) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once. The above provisions shall also apply in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment[5]. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office[6].

1 *Venkatesagadu*, (1887) 10 Mad. 165, F.B.; *Darba*, (1877) 1 All. 461, F.B.
2 U. B. C. M., s. 126.
3 *Vide* Criminal Procedure Code, s. 386.
4 *Ibid*, s. 387.
5 *Ibid*, s. 388.
6 *Ibid*, s. 389.

The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor But the Court which levies the fine must be the same as the Court which imposed it[1]

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate

Termination of imprisonment on payment of proportional part of fine

ILLUSTRATION

A is sentenced to a fine of one hundred rupees and to four months imprisonment in default of payment Here if seventy five rupees of the fine be paid or levied before the expiration of one month of the imprisonment A will be discharged as soon as the first month has expired If seventy five rupees be paid or levied at the time of the expiration of the first month or at any later time while A continues in imprisonment, A will be immediately discharged If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed If fifty rupees be paid or levied at the time of the expiration of those two months or at any later time while A continues in imprisonment, A will be immediately discharged

COMMENT

If the fine imposed on an accused is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a proportion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place

PRACTICE

Court has no power to refund fine —Where a prisoner paid a portion of his fine, but that fact not having been communicated to the jailor, he underwent the full term of imprisonment, it was held that, under those circumstances the Court had no power to order the fine to be refunded[2] The accused must apply in such a case to the Government

Calcutta Rule —Magistrates and sub-divisional officers should be very careful, in all cases in which a person is sentenced to imprisonment in default of fine, to see that if the fine or a proportional part of it be paid or levied immediate [illegible] prisoner may [illegible] whole or part of the fine is levied, it is the duty of the sentencing Judge to inform the authorities at Port Blair of the fact[4]

70 The fine, or any part thereof which remains unpaid, may be levied at any time within six years[1] after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any

Fine leviable within six years, or during imprisonment

[1] *Chunder Coomar Mitter v Modhoosoodun Dey* (1868) 9 W R (Cr) 50 F B.
[2] *Natha Mula* (1867) 4 B H C (Cr C) 37
[3] *Bengal Govt Letter*, No. 1060 T 1864
[4] 5 M. H. C. App 44

time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts².

Death not to discharge property from liability.

COMMENT.

Imprisonment in default of payment of fine does not liberate the offender from his liability to pay the full amount of fine imposed on him. Such imprisonment is not a discharge or satisfaction of the fine, but is imposed as a punishment for non-payment[1] or contempt or resistance to the due execution of the sentence. The authors of the Code observe: 'We do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

"It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine. But this harshness is rather apparent than real; if the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case; that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in goal, whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person.... The offender who has been sentenced to fine must be considered as a debtor, and, as a debtor, not entitled to any peculiar lenity. It will be difficult to show on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to

[1] *Sagwa*, (1901) 23 All. 497.

cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice"[1]

1. **'Within six years'.**—The bar of six years may save the property of the accused but not his personal arrest The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of six years[2]

2. **'Death of the offender does not discharge from the liability any property which would be liable for his debts'.**—Under the amended s 386, Criminal Procedure Code movable as well as immovable property of the offender can be sold for realising the fine The cases of *Lallu Karwar*[3] and *Sita Nath Mitra*[4] are no longer of any authority

Fine once irrecoverable may be recovered if the offender obtains property subsequently.—The mere fact that a Magistrate having written off a fine as irrecoverable, is no bar to his taking action to levy the fine within the time allowed by law, if it subsequently appears that the person from whom it was due has acquired the means of paying it[5]

PRACTICE

Procedure—An offender, who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine, is still liable to have the amount levied by distress and sale of his property if the Court for special reasons to be recorded in writing considers it necessary to do so The Court must act in accordance with the provisions of s 386 of the Code of Criminal Procedure

Bombay Circular.—The attention of Sessions Judges and Magistrates is called to s 70 of the Indian Penal Code, and ss 386, 387 and 388 of the Code of Criminal Procedure, and to the fact that the proviso to s 386 (1) directs that after the whole of the imprisonment awarded in default of payment of fine has been undergone, no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary to do so In cases where further steps are required, if at any time subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine or any part of it, remains unpaid, and the Court, from information [illegible], has reason to think that there is any movable property belonging to the o[illegible]der, it should issue a fresh [illegible] within a specified period, retu[illegible] a fine, or any portion [illegible] jail or [illegible] fine, [illegible] jailor [illegible]

Calcutta Rule—A warrant issued under s 386, Criminal Procedure Code, for the levy of a fine should ordinarily be directed to a Police Officer (see Form No XXXVII, Schedule V, Criminal Procedure Code), and the authority issuing it should set a time for the sale and for the return of the warrant If no one claims the property distrained, the Police have the power of selling it within the time specified in the warrant, without any previous reference to the Magistrate, if a claimant come forward, then the ownership of the property destrained must be determined by the Magistrate, and not by the Police If at any time [illegible]

[1] Note A, pp 99, 100
[2] *Ganu Sakharam*, (1884) Unrep Cr C. 207
[3] (1868) 5 B. H. C (Cr C) 63
[4] (1892) 20 Cal 478
[5] *Latif [illegible]* v *[illegible]* (190[illegible]) [illegible] A. W N [illegible] 3 A. L J [illegible]
[6] B. H. Cr C. Ch IX, s. 15[illegible], p 9[illegible]
[7] *Ibid*, s. 15[illegible], p 9[illegible]

sequent to the return of the warrant, and within the period of six years from the passing of the sentence, the fine, or any part thereof, remains unpaid (s. 70 of the Penal Code), and the Magistrate has, from information gained in any way, reason to think that any movable property belonging to the offender is within his jurisdiction, he should issue a fresh warrant for the attachment and sale of such property. Such warrant should be made returnable within a time to be definitely fixed therein[1].

When a Court of Session realizes a fine imposed by it on an accused person, it shall prepare the usual warrant for the realization of the fine, and shall forward it to the Magistrate of the district concerned with an endorsement thereon to the effect that the fine has been realized[2].

Patna Circular.- In any case when, under any special or local law, imprisonment in lieu of fine is to be taken as a full satisfaction of the penalty, if the convicted person is sentenced to undergo the imprisonment, the clerk in charge of the Fine Register shall at once obtain a certificate from the Court imposing the sentence that the fine is not to be realised, and the amount of the fine shall, if entered, be struck out of the Register of criminal fines. Nothing here laid down shall interfere with any special directions of law for the attempted realization of fine by distress or otherwise before carrying out any sentence of imprisonment upon the offender[3].

Lahore Circular.- Fines should never be excessive with reference to the means of the offender, and the amount imposed should always be distinctly explained to the person sentenced.

2. Although section 70 of the Indian Penal Code gives the power to levy a fine at any time within six years or during the term of imprisonment of the offender, if this be more than six years, neither that section nor section 386 of the Code of Criminal Procedure requires that the power should be exercised in every case. The law is permissive and not imperative. When efforts have been made to realise a fine by distress and sale, and when the offender has undergone the imprisonment awarded in default of payment of fine, the Court should exercise its discretion, according to the circumstances of each particular case, as to whether, after the release of the prisoner, any further steps should be taken towards the realisation of the fine within the period allowed by law. If there is reason to believe that the offender is able to pay and will not, preferring to undergo imprisonment, the law should be strictly enforced; but if it appears that the fine was not paid for want of means or that its full realisation would be ruinous to the offender or his family, it is not desirable that further steps should be taken.

3. Every Court, whether Criminal or Civil, will keep up in the vernacular a separate Fine Register (No. XVII Criminal), and it will be the duty of the Reader of each Court to see that all fines imposed by the Judge or Magistrate are entered the same day in this register. Compensation awarded under section 560 of the Code of Criminal Procedure will be treated as a fine imposed in a case instituted on complaint by the original defendant. Fines imposed under section 480 of the Code of Criminal Procedure, or under Order XVI, Rules 12, 17, 18, and Order XXXIII, Rule 11, of the Code of Civil Procedure, will also be entered in the register and dealt with according to the instructions laid down in these directions. The register should be inspected and signed, in the case of Sessions Courts, by the Judge at the close of each Session, and, in Magistrates' Courts, by the presiding Magistrate once a week.

4. In addition to the above register there will also be kept up in the same form, at the head-quarters of each District, a General Register of Fines. This register will be under the special charge of the Fine Moharrir, whose duty it will be to see that the register is correctly maintained, that the necessary measures are taken from time to time to realise the fines, and that sums realised are duly disposed

[1] C. H. C. R. & O., Ch. I, r. 117, p. 41. This rule will have to be modified in the light of the new s. 386 of the Code of Criminal Procedure.

[2] *Ibid*, r. 118, p. 42.

[3] Pat. H. C. Cr. C., para 11, p. 145.

of He should in each case look for his orders to the officer who, under these directions, is responsible for the due execution of the sentence of fine Separate pages of this register and separate serial numbers should be assigned to each

with the rules hereinafter provided

This register should be inspected and signed by the Magistrate of the District, or the Assistant Commissioner or Extra Assistant Commissioner specially charged with the supervision of the Fine Department, once a week at least

5 (i) If a person, at the time of being sentenced to fine, whether or not in addition to other punishment, tenders payment, in whole or in part, to the Judge or Magistrate imposing the fine, such Judge or Magistrate will receive the amount tendered and grant, under his hand, a receipt in the form prescribed for the same

(ii) If the fine has been paid in full, the Court will cause an entry to that effect to be made on the file of the case and will sign such entry, and, if the Court is a Court of Session, will, in forwarding a copy of the sentence to the Magistrate of the District, under section 373 of the Code of Criminal Procedure, notify the fact of payment with a view to the necessary entry being made in the District Register of Fines If the fine has been paid only in part, the Court will likewise cause such payment to be entered on the file of the case, and will then proceed as provided hereinafter

(iii) Fines thus paid direct into Court at the time of sentence should be entered at once in the Court's Fine Register, the amount received being noted by the presiding officer with his own hand in column 12, and should be then dealt with in the manner provided in paragraph 20 of these directions

6 Under section 386 of the Code of Criminal Procedure it is in the discretion of the Court passing a sentence of fine to issue a warrant for the levy of the amount by distress and sale of moveable property belonging to the offender, although the sentence provides for his imprisonment in default If the fine is imposed by a Court of Session, the Judge should in the absence of any special direction to the contrary in the law under which the fine is imposed, direct the warrant to the Magistrate of the District If the whole or a portion of the fine has been awarded in compensation or reward, this fact should be communicated, along with the warrant The Magistrate of the District to whom the warrant is addressed will, on receipt, cause the particulars to be entered in the proper page of the General Fine Register, and the Fine Moharrir will then be responsible that the proper steps are taken for the realisation of the fine

7 If the fine is im
except when issued by a
provided in paragraph 1..
jurisdiction the offender resides Warrants for the levy of fine, received by a District Magistrate under the preceding paragraph, should also be executed through the Tahsildars in the same manner as the warrants issued by Magistrates and Civil Courts

8 The practice of issuing a written order to the police for the realisation of the fine has been discontinued under the orders of the Local Government In
, the Court
Procedure
sentenced
to fine only and to imprisonment in default of payment, and a warrant is issued
of imprison-
out sureties,
the

warrant, such day not being more than fifteen days from the date of executing the bond. If the fine has not been realised by that time, the Court may direct the sentence of imprisonment to be carried into execution at once. It will be seen that section 388 contemplates the issue of a warrant in all cases where the Court suspends the execution of a sentence of imprisonment.

10. Warrants issued for the levy of fines by distress and sale of movable property situate in Cantonments will not be executed by the Tahsildar, but by the officers of the Cantonment Magistrate's Court.

11. Formalities will be observed in attachment, sale and adjudicating upon objections similar to those in force in the execution of Civil decrees, with this difference, that the process issues on the Criminal side.

12. Although agricultural implements are not exempt from distress and sale in realisation of a fine, the measure is one which should be resorted to with discretion, otherwise it may entail undue hardship.

13. When an objector comes forward, he should be warned of the penalties prescribed in section 207 of the Indian Penal Code for a fraudulent claim to property to prevent its seizure in satisfaction of fine. After this warning, the objection should be inquired into and disposed of, either by admitting the claim or referring the objector to a civil action if his claim seems prima facie groundless.

14. The officer employed on the duty of selling property attached in default of payment of fines will receive a commission at the following rate, to be deducted from the sale-proceeds—

if the sale-proceeds do not exceed Rs. 5,000, at 5 *per cent.*

if the sale proceeds exceed Rs. 5,000, 5 *per cent.*, on Rs. 5,000, and at ½ *per cent.* on the remainder.

15. When a Tahsildar has realised a fine or part of a fine, in the manner above provided, he will forthwith dispose of it as hereinafter directed in paragraph 19 below, and return the warrant to the Magistrate who issued it with an endorsement that he has done so. In the endorsement should be noted the date of payment into the Treasury and the number of the Treasury receipt. On the return of the warrant the Magistrate will at once notify in the form prescribed, under his hand and seal, the payment endorsed thereon to the Superintendent of the Jail in which the offender is confined, if he is in prison, and, after causing the necessary entries to be made in his Fine Register and attaching the warrant to the file of the case, will pass on the papers to the Fine Moharrir with a view to the results reported by the Tahsildar being noted in the General Fine Register; a fresh warrant being prepared if further proceedings appear to be called for.

16. (*i*) All Magistrates will, at any stage of the proceedings, receive fines imposed by themselves or their predecessors in office, if tendered in their Court, and proceed in the manner described in paragraph 5, and, if the offender is in prison, intimate the payment in the prescribed way to the Superintendent of the Jail in which he is confined.

(*ii*) Magistrates of Districts will likewise receive fines tendered to them in satisfaction of warrants received from the Courts of Session, under the provisions of paragraph 6.

(*iii*) Tahsildars will always receive fines by whomsoever tendered and will grant receipts. These receipts must be in the prescribed form and be signed by the Tahsildar in full, and will then be admitted by the Magistrate executing the sentence as proof of payment.

(*iv*) Superintendents of Jails will also receive fines in respect of prisoners in their jails, and send the money with a report to the Magistrate of the District. The Magistrate of the District will make over sums so received to the Nazir, to be dealt with according to the provisions of paragraph 19, and when this has been done, will forward the report of the Superintendent of the Jail, duly endorsed with the date on which the fine was paid into the Treasury and the number of the

Treasury receipt, to the Magistrate executing the sentence, who will inform the Tahsildar, and cause the necessary entries to be made in his Fine Register and the report to be attached to the file of the case

17 A form of receipt has been prescribed When a fine is received by a

need only be prepared in duplicate, one copy being given to the person paying the fine and the counterfoil being retained for record by the Court

18 Fines may be paid in any district, but if paid in any district other than that in which the offender was sentenced, the following procedure should be carefully observed —

(a) When a warrant or intimation has been received from the district where the fine was imposed, the amount received or realised should either be at once credited to Government and intimation sent to the Magistrate of that district, or, in case the whole or any part of the fine is to be paid in compensation or to be credited to any Local Fund, so much should be remitted to the Magistrate of that District, and intimation sent to him that the remainder has been credited to Government In case the fine is only partially realised, and it is not clear in what way the amount should be disposed of, it should be kept in deposit pending instructions from the Magistrate of the District concerned, to whom reference should at once be made

(b) In case no warrant or intimation has been received, the amount received or realised should be placed in deposit and intimation at once sent to the Magistrate of the District where the fine was imposed with a request for instructions as to its disposal

(c) Any fine, or portion of a fine, which has to be finally credited to Government, should be credited in the district in which it is levied, and the Magistrate of the District in which the fine was imposed should, when communicating, as laid down in clauses (a) and (b) of this paragraph, with the District Magistrate who has received the fine, notify to him the amount to be so credited

(d) Unless the payment is made to the Jail authorities, notice of the realisation should at once be sent to the Superintendent of the Jail in which the prisoner

District Officers are not to require the Vakils of Indian States attached to their Courts to realise fines awarded against offenders whose homes are in foreign territory for offences committed in British territory They should merely record the fine and acquaint the offenders' relatives through the Vakil If the fine be not paid the prisoner must undergo the term of imprisonment in default (if any) awarded in the sentence

19 (i) Every sum received by a Judicial Officer in payment of fine will be taken charge of by the Nazir of his Court, or by the Assistant Nazir or other officer performing the duties of Nazir, except in Honorary Courts where the Honorary Magistrate himself takes charge of such sums, until such time as they can be paid into a Government Treasury If the officer holds his Court in the immediate vicinity of a Government Treasury, whether District, Sub-divisional or Tahsil, the

if imposed by the Court of Session, to the Magistrate of the District acting under paragraph 6, the date of payment into the Treasury with the number of the Treasury receipt will be noted in respect of each fine so paid in the Court's Fine Register and on the record of the case.

(*ii*) Sums realised on account of fines or otherwise in Criminal cases, in the Court of any Honorary Magistrate whose place of sitting is at a distance from a Treasury or Sub-Treasury, may be remitted to the Treasury by money-order, instead of by messenger, if the District Magistrate considers it expedient to direct that this course shall be followed in the case of any such Court.

(*iii*) The cost of such money-order will be debited to Judicial contingencies.

(*iv*) Sums thus paid into the Treasury will be paid to the credit of Government, or of a Municipal or Local Fund, or as a deposit, according as the fine is, under the terms of the sentence or the orders relating thereto, to be credited to Government, or to a Municipal or Local Fund, or to be paid in compensation or reward.

(*v*) Sums paid into the Treasury for credit to Government should, even in appealable cases, be credited at once to Government, and will be subject to refund if remitted on appeal or in revision. A form of certificate for refund of fine has been prescribed. Before the amount of the remitted fine, or any portion of it, can be refunded, the exact amount realised and credited in the accounts of the Treasury must be ascertained and certified by the Superintendent of the Deputy Commissioner's Office, and the certificate must be passed for payment by the officer in charge of the Treasury to which it is presented for that purpose.

(*vi*) Sums paid into the Treasury for credit to a Municipal or Local Fund should also be credited at once to the fund concerned and will be subject to refund if remitted on appeal or in revision.

(*vii*) Sums paid into the Treasury as deposits will be withdrawable on the order of the Court executing the sentence, on application being made therefor by the party or parties entitled to receive the same, after the expiry of the period of appeal or, if an appeal has been presented, after the decision of the appeal. When sums are realised which, under the term of the sentence, are payable in compensation or reward, intimation should be given to the party or parties concerned by the Court which is executing the sentence.

(*viii*) A strict observance of the foregoing directions is necessary, as the Code of Criminal Procedure contains no provision for recovering sums once paid away in compensation or reward.

20. (*i*) Further rules on the subject of crediting and accounting for fines have been issued by the Accounts Department, and these rules must be strictly observed. At the close of each month a statement, for the whole District, of all the fines imposed by Courts, which were realised and credited to Government during the month, should be prepared and submitted to the Accountant-General or, if no fines were so realised, a certificate that no realisations were effected should be submitted. The statement for the Sessions Court will be prepared by the District Moharrir of Fines and signed by the Magistrate of the District. The officer who signs the statement will be responsible for its accuracy. The certifying officer should at the same time satisfy himself that realizations excluded from the statement have been duly accounted for.

(*ii*) The attention of Courts realising fines, which under any Act in force are credited to a Municipal Fund, or arrears of a Municipal tax, is drawn to rule 352 of the rules under the Municipal Account Code. This rule directs that such Court shall submit a monthly statement of such sums realised to the Committee concerned in the prescribed form.

(*iii*) To facilitate the preparation of these statements and the checking of the items excluded from them, a register of fine realisations, No. XVIII, will be kept by the District Fine Moharrir for all Courts in the District and for the Sessions Court. The entries in this register should invariably be made at the same time as the cor-

responding entries are made in the General Register of Fines, No XVII, prescribed in paragraph 4 above The register should be totalled at the end of each month and should then be examined and checked by the officer in charge of fines with reference to the Treasury certificate in regard to credit of fines in the Treasury during the month Register No XVIII is not to be maintained in future by Courts

will
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if a
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the Fine Moharrir, from time to time to draw the attention of the Magistrate to unrealised fines, in order that fresh processes may issue as assets are indicated

22 At the close of each quarter, a return will be submitted to the Sessions Judge in the prescribed form showing the progress which has been made during the quarter in realising the fines imposed by his Court The realisation shown in this return should be carefully noted in the appropriate column of the Sessions Courts' Fine Register, and explanations should be called for or instructions issued in cases in which failure to realise seems to call for explanation or orders The result of this return will be embodied in the Sessions Judge's Annual Statements In accordance with the instructions of the Government of India fines confirmed or awarded by a Court of Session on reference under section 380 of the Code of Criminal Procedure are shown in the Annual Statements against the Court of S[illegible] The realisations on account of such [illegible] ons of the Court of Sessions, and not [illegible] rmed or awarded on reference should [illegible] the Court of Session and should be included in the quarterly report required by this paragraph and excluded from the District returns

23 Care should be taken to prevent illegal detentions in prison When the Superintendent of a Jail receives a fine or a notice, in the prescribed form, that a fine has been realised, he will note the realisation in the warrant of imprisonment, and, if the prisoner is entitled to his release, will release him and return the warrant, duly endorsed, to the Magistrate

24 Whenever prisoners under sentence of fine are transferred to a Jail in another district, care should be taken to notify on the back of the warrant the amount of fine realised, if any realisation has been effected The name of a transferred prisoner who is sentenced to fine must necessarily remain on the Fine Register of the District in which sentence was passed until the whole of the fine has been paid, or until the period within which it can be realised has expired

25 A careful observance of the foregoing directions will result in the following checks —

I—Every fine imposed by Courts exercising jurisdiction in the District will be entered in the Fine Registers

II—When the fine has been paid into Court, the fact will appear in the

VI—An inspection of the District Register of Fines will always at once show every stage of each transaction and quarterly, half yearly or annual audit can be held of the whole fine transactions of the period, by co[illegible] each

of the register with the record of the case and the credit in the Treasury. The officer-in-charge of the Fine Department should occasionally test the correctness of the entries in the District Fine Register by comparing some of them with the records of the cases to which they relate and with the credits in the Treasury.

26. It will be observed that fines imposed by Civil Courts under the powers conferred by section 480 of the Code of Criminal Procedure and Orders XVI and XXXIII of the Code of Civil Procedure, must be dealt with in accordance with the instructions laid down in this Chapter so far as they are applicable. It will accordingly be necessary for Courts of purely Civil jurisdiction to keep up Criminal Register No. XVII.

27. District Magistrates should invariably appoint an Assistant or an Extra Assistant Commissioner to supervise the Fine Department, and should themselves, from time to time, see that these directions are understood and carried out. Whenever any Court is inspected by a controlling officer, special attention should be given to the subject[1].

Oudh Circular.—If at any time subsequent to the return of the warrant and within the period of six years from the passing of the sentence, or within the period of imprisonment to which the offender is liable under the sentence when such period exceeds six years, the fine or any part thereof remains unpaid, the Magistrate, if he has reason to think that there is any movable property belonging to the offender liable to attachment and sale, may, even though the offender has completed the term of imprisonment awarded in default of payment of the fine (s. 70, Indian Penal Code), issue a fresh warrant, returnable within a certain time, for levy of the unpaid amount by distress and sale of such property[2].

Limit of punishment of offence made up of several offences.

71. Where anything which is an offence[1] is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where[2] anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where[3] several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

ILLUSTRATIONS.

(*a*) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(*b*) But if while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes

1 L. H. C. R. & O., Vol. IV. pp. 92-101.
2 O. C. D. 127. This circular will have to be modified in the light of the new s. 386 of the Code of Criminal Procedure.

hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

COMMENT.

This section governs the whole Code and regulates the limit of punishment in cases in which the greater offence is made up of two or more minor offences It is not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it does not, therefore, affect the question of conviction, which relates to the province of procedure

This section contemplates separate punishments for an offence against the same law and not under different laws[1]

The rules for assessment of punishment are laid down in ss 71 and 72 of the Penal Code and s 35 of the Code of Criminal Procedure[2] Section 35 of the Code of criminal Procedure provides that when a person is convicted at one trial of two or more offences the Court may, subject to the provisions of s 71 of the Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict, and in the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the

The word 'distinct' is omitted from the section It is not therefore necessary that the offences should be distinct in order to enable a Magistrate to pass consecutive sentences, subject to the provisions of s 71 of the Penal Code[3]

Section 235 of the Code of Criminal Procedure contains only rules of criminal pleading in regard to joinder of charges, and it does not deal with the sentence to be passed on the charges of the offences mentioned in the several illustrations It says

"(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more of such acts

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71

ILLUSTRATIONS.

to sub-section (1)—

(a) A rescues B a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was A may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code

[1] *Sakharam Lax* (1917) 19 Cr L J 157 (1884) 7 All 29 33
[2] *Sakharam Hari* (1886) 10 Bom 493 495 [3] *Hanmu Timma*, (1928) 30 Bom L R
Narchan, (1888) 12 Mad 35, *Dunjir Singh*,

(*b*) A commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with B's wife. A may be separately charged with, and convicted of, offences under ss. 454 and 497 of the Indian Penal Code.

(*c*) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code.

(*d*) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under s. 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(*e*) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such a proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(*f*) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(*g*) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(*h*) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (*a*) to (*h*) respectively may be tried at the same time.

to sub-section (*2*)—

(*i*) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code.

(*j*) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under ss. 411 and 414 of the Indian Penal Code.

(*k*) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(*l*) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under sections 471 (read with s. 466) and 196 of the same Code.

to sub-section (*3*)—

(*m*) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sectiens 323, 392 and 394 of the Indian Penal Code".

1. **First clause.**—The first clause of this section refers to cases similar to ill. (*i*) to s. 235, Criminal Procedure Code, which says that if A wrongfully strikes B with a cane, A may be separately charged with, and convicted of, offences under ss. 352 and 323 of the Indian Penal Code. Three separate acceptances of deposits

from three persons at different times cannot be said to be parts of one composite offence under this clause[1]

The combined effect of this clause and clause (1) of s 235 Criminal Procedure Code, is exemplified in *Nilmony Poddar s* case[2], discussed hereafter

The word 'offence' denotes a thing punishable under the Code or under any special or local law (s 40)

2 **Second clause.—First provision.**—This clause has two provisions. The first refers to cases mentioned in cl (2) of s 235, Criminal Procedure Code and the second to cases covered by cl (3) of that section The first provision provides for an act which presents different aspects according to the view which may be taken of the various circumstances constituting the act and which therefore fall within two or more separate definitions of offences

Where there are two provisions one specific and the other general, the specific provision ought to be applied in preference to the general one The applicant was accused of having abetted the personation of a voter at a municipal election in that not being himself acquainted with the person who came forward to vote he had, on the advice of others, put his name to a 'signature sheet' in token that the thumb mark made by the voter was that of the person entitled to vote under a certain name on the electoral roll It was held that, inasmuch as the acts done by the applicant constituted the specific offence provided for by s 171 F he could only be tried for that offence and could not be tried for abetment of the general offence provided for by s 465[3]

3. **Second provision.**—The second provision refers to cases falling under cl (3) of s 235 of the Criminal Procedure Code Illustration (*m*) is an example of such cases

'Constitute an offence '—This phrase must be understood to refer to the definitions of the offences as enunciated in the Code itself irrespective of the identity or non identity of the evidence whereby the several acts are proved [4]

Section 71 of the Penal Code and s. 235 of the Criminal Procedure Code —Mayne combines both these sections and gives the result, which nearly corresponds to s 454 of the former Criminal Procedure Code (Act X of 1872) —

I Where the repetition of several offences constitutes one offence of exactly the same character, all the instances taken together can only be treated as making up one offence, though the greater or lesser number of instances may add to or diminish the heinousness of the offence [e g , s 71 ill (*a*)]

Cases —Theft of property belonging to two persons —Where the accused stole property at night belonging to two different persons from the same room of a house it was held that he could not be sentenced separately as for two offences of theft[5] Stealing two bullocks at the same time belonging to two different owners, which were tied to the yoke of a cart, was held to constitute only one offence of theft[6] Where the accused, a guard in charge of a goods train, stole articles belonging to two different persons, from separate bags in a truck it was held that he could not be convicted and sentenced separately for two distinct offences of theft[7]

Dacoity in respect of property belonging to two persons —Where a gang of dacoits in pursuance of a common object, viz , robbery attacked at the same time two houses belonging to two different owners in the same village, it was held that

1 *Clifford* (1913) 6 B L T 201 [illegible]

[illegible] All 58 69 [illegible] 38 cf J

4 Per Mahmood, J in *B[illegible] Jan*, (1887) 10

ey could not be punished separately on separate charges of dacoiting each ouse, but could only be punished for one offence of dacoity[1].

II. When a single transaction or connected series of events gives rise to veral offences of a different character, or to several offences of the same character fecting different persons, each such offence is separately indictable and punishble (e.g., s. 71, ill. (*b*), and Criminal Procedure Code, s. 235, ills. (*a*), (*f*) and (*g*)].

Where different persons are injured, grievous hurt being caused in one case id simple hurt in others, it is competent for the Court to impose separate and cumulative sentences[2]. But separate sentences cannot be passed under ss. 323 id 326 in the case of an assault upon a single person[3].

Cases.—House-breaking to commit mischief and assault, and mischief and sault.—An accused person was convicted under s. 457 of the Penal Code of ouse-breaking by night in order to commit an offence (mischief and assault) and so under ss. 426 and 352 for the offences of mischief and assault, and punished parately for each offence. These offences formed part of one transaction. It as held that the sentences were legal[4].

House-breaking after making preparation for causing hurt or assault and mmitting of rape.—Where the accused committed house-breaking by night after aking preparation to cause hurt or assault (s. 458) and then committed rape 376), it was held that separate sentences for both the offences were legal[5].

Criminal intimidation to three persons at one time.—An accused person, io threatened three witnesses, was convicted and sentenced to four months' iprisonment for the threat to each witness. It was held that if a person at one ne criminally intimidates three different persons, and each of those persons ings a separate charge against him, he may be convicted for an offence as against ch person, and be punished separately for each offence[6].

Resistance to the taking of property by a public servant, and assaulting m.—Where the accused objected to accompany a constable who had been directed produce him before the Court, seized the constable by the arm, and resisted his rrying away a pony which the accused was charged with having misappropriated, was held that he was guilty of separate offences under ss. 353 and 183, d the infliction of separate sentences for each offence was not prevented by this ction[7].

Rioting and hurt, and rescuing from custody.—The accused were charged th. and convicted of, rioting and causing hurt, the common object of the unlawful sembly being the rescue of the first accused who was detained in lawful custody d the first accused was further convicted of and punished for escape under s. 224 d the other accused for rescue under s. 225. It was held that the punishments ider ss. 224 and 225 inflicted in addition to those for rioting and hurt were proper, asmuch as the offences of rioting and escape and rescue were distinct offences, ough parts of the same transaction, and did not come within the meaning of this ction[8]. Where the accused in the course of rioting caused hurt also, it was held at they could be convicted of rioting as well as of causing hurt (s. 323) and parate sentences could be passed[9]. But where the causing of the hurt is itself the

1 *Nga San Dan*, (1889) S. J. L. B. 444.

2 *Bakshar*, (1915) 37 All. 628 : *Pira*, (1925) L. L. J. 198.

3 *Devi Sahai*, (1927) 1 Luck. C. 199.

4 *Nirichan*, (1888) 12 Mad. 36. In this se, *Narjan*, (1874) 7 M. H. C. 375, was not lowed. But so far as the question of punishent goes these two cases can be reconciled view of the amended s. 35 of the Code of iminal Procedure.

5 *Lakh Singh*, (1922) 6 L. L. J. 111 ; *Mala Arjun*, (1899) 1 Bom. L. R. 142, 23 Bom. 706, F.B., distinguished.

6 *Goolzar Khan*, (1868) 9 W. R. (Cr.) 30.

7 *Joyth Mohun Chunder*, (1870) 14 W. R. (Cr.) 19.

8 *Anon.*, (1894) 1 Weir 34. Separate sentences for causing hurt and rescuing cattle may be passed : *Anthoni Udaiyan* v. *Ragupathayyar*, (1927) 53 M. L. J. 653.

9 *Kalyan Rai*, (1917) 39 All. 623 ; *Fajira*, (1928) 30 Cr. L. J. 295.

particular form of the force or violence which contributed to the offence of rioting separate sentences cannot be imposed[1]. There is a conflict of authorities on this point It has been held that separate convictions are legal under ss 147 and 353, Penal Code, even when assault is committed in furtherance of the common intention of the unlawful assembly[2]

Rioting and house-trespass —Separate sentences for rioting under s 147 and for house-trespass after preparation for causing hurt under s 452 can be passed[3]

Theft and receiving gift to recover stolen property.—Where a person was proved to have committed a theft and also the offence under s 215, it was held that he might be convicted and sentenced for each of such offences, for the offences were distinct transactions capable of being proved independently of each other But where the theft is proved not by direct evidence but by inference drawn from the facts which proved the commission of the offence under s 215 separate convictions and sentences should not be passed[4]

Wrongful confinement and assault —The accused were convicted under ss 352 and 312 and sentenced separately for each of the offences the acts found against them being that they seized, dragged, and pushed the complainant to a certain place in order to punish him It was held that what the accused had been punished for was the whole series of acts and that series of acts came within the

[illegible]

(s 372)[7]

Abduction and rape —Where the accused had forcibly carried away the complainant and had subsequently raped her, it was held that he had brought himself within the purview of s 366 the moment he forcibly carried her away with the intention required by that section, and the infliction of a separate additional sentence under s 376 was not contrary to the provisions of this section[8]

Rioting and grievous hurt —The question as to whether a member of an unlawful assembly, some members of which have caused grievous hurt, can be

[illegible]

sentences may be passed for each of the two offences without regard to the limit of the combined sentences In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences[9] But where the accused is convicted of rioting and of hurt which he has not himself committed but for which he is liable under s 149, there is a difference of opinion

[1] *Bishna* (19??) 24 Cr L J 629, *Kunna mmal Majan* (1927) 28 Cr L J 1004, *Kun* [illegible]

[illegible] *Nuggerbhatin*, (1865) 3 W P (Cr) 19, *Calla chand* (1867) 7 W R (Cr) 60, *Durgoolla*, (1868) 9 W P (Cr) 33, *Gobind Chunder Roy*, (1871) 16 W R (Cr) 60, *Sobrai Cowallah*, (1873) 20 W R (Cr) 70

[8] *Ghulam Muhammad* (1926) 7 Lah 484

[9] *Bana Punja* (1892) 17 Bom 260 F B, *Chandra Kant Bhattacharjee* (1885) 12 Cal 495 *Mohur Mir* (1889) 16 Cal 725, *Ferasat* (1891) 19 Cal 105 *Dungar Singh* (1884) 7 All 29, *Pershad* (1884) 7 All 414 F B judgments of Oldfield and Duthoit, JJ, in *Ram Sarup*, (1885) 7 All 757 F B

A Full Bench of the Calcutta High Court has ruled that separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code[1]. Where an Excise Sub-Inspector, on receiving information that some persons were illicitly distilling liquor in some jungles, proceeded thither unaccompanied by a police-officer and, finding his information correct, arrested some persons, and took them to a neighbouring village and asked for the assistance of the Panchayat who, instead of giving assistance, collected men and rescued them from custody and assaulted the Excise Sub-Inspector, it was held that separate sentences should not be passed for rioting and assaulting a public servant in execution of his duty when practically the offence of assaulting the public servant was the common object of the unlawful assembly, the members of which committed such rioting[2]. In this case their Lordships solved the difficulty by considering the separate sentences passed under ss. 147, 353 and 225 as one consolidated sentence so as to meet the offence of which the accused were convicted. Where the accused was sentenced to two years' rigorous imprisonment under s. 147 and a further sentence of three years' imprisonment under s. 325 read with s. 149, both sentences being directed to run concurrently, Sanderson, C. J., held that the infliction of separate punishments for the two offences was illegal under para 1 of this section and it did not make any difference that the sentences were directed to run concurrently. Cuming, J., expressed the opinion that the prohibition in this section against punishing an accused with the punishment of more than one of the offences was obviously met by making all the sentences which had been imposed run concurrently and that where two separate sentences had been passed the illegality did not necessarily attach to the sentence which was passed second in point of time[3].

The Patna High Court has adopted the same view. It has laid down that it is illegal to record separate convictions for offences under ss. 147 and 325 read with s. 149 and that separate sentences in respect of the two offences are illegal[4]. It has also held that separate sentences under ss. 147 and 325 are not *per se* illegal, but the sentences imposed ought not to be heavier than are justifiable upon the particular facts and circumstances of the case[5]. If the common object of the accused is to commit an assault, but, in prosecution of that object, grievous hurt or death is caused by the members thereof, this section will not apply and separate sentences under s. 147 or s. 148 and s. 324 or s. 325 read with s. 149 will not be illegal[6].

The Madras High Court has taken a similar view. When the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under s. 147, cannot be convicted also under s. 323 or s. 325 read with s. 149, unless he himself is proved to have caused hurt in the course of the riot[7].

A Full Bench of the Bombay High Court has decided that where a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the

1 *Nilmony Poddar*, (1889) 16 Cal. 442, F. B., overruling *Loke Nath Sarkar*, (1885) 11 Cal. 349, and approving *Ram Partab*, (1883) 6 All. 121; *Sahadev Ahir*, (1903) 8 C. W. N. 344, 1 Cr. L. J. 197; *Keamuddi Karikar*, (1923) 51 Cal. 79; *Basiruddin*, (1927) 31 C. W. N. 532. See *Hansa Pathak* v. *Bansi Lal Das*, (1901) 8 C. W. N. 519, where an effort is made to distinguish *Nilmony's* case, and an opinion is expressed that the latter decision does not apply to the case of separate sentences for unlawful assembly and theft. This is opposed to the ruling in *Mithoo Singh* v. *Gopal Lal*, (1899) 3 C. W. N. 761.

2 *Hridoy Mondal* v. *Jagananda Das*, (1899) 4 C. W. N. 245.

3 *Kiamuddi Karikar*, (1923) 51 Cal. 79, followed in *Basiruddin*, (1927) 31 C. W. N. 532.

4 *Paltu Singh*, (1918) 3 P. L. J. 641; *Nemdhari Singh*, (1920) 2 P. L. T. 91; *Bajo Singh*, (1928) 8 Pat. 274.

5 *Ramnath Rai*, (1921) 2 P. L. T. 549.

6 *Mathura Rai*, (1921) 2 P. L. T. 316.

7 *Krishna Ayyar*, (1918) 24 M. L. T. 96, [1918] M. W. N. 526.

The former Chief Court of the Punjab distinguished the Calcutta Full Bench case of *Nilmony Poddar* in *Nur Khan*[1] in which it held that *separate* sentences under ss. 147 and 325 were legal inasmuch as each of the offenders might have been convicted individually under s. 325, and further under ss. 149 and 325. It also held that this section was inapplicable to the case of conviction and separate sentences under s. 147 and ss. 149 and 325[2]. On the question going before a Full Bench, the following two propositions were laid down: (1) Separate sentences for the offence of rioting and grievous hurt cannot be legally imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting. (2) Separate sentences cannot be awarded where the first clause of this section applies, and the offence committed is made up of parts, any of which part is itself an offence, but they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or where the members of it knew that such offences were likely to be committed in prosecution of that object[3]. The Lahore High Court has held that separate sentences under *ss. 147 and 332 are not illegal*[4], *although in practice it is undoubtedly better* to give a single sentence for all the offences or to order the sentences to run concurrently[5]. The application of s. 149 did not arise in these cases.

The Rangoon High Court adopting the Bombay view has held that in cases of rioting under s. 147, resulting in grievous hurt, convictions and separate sentences under s. 325 are legal against all the accused who actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are, under s. 149, liable for all the results[6].

III. Where the same facts will constitute different offences, the indictment may, and ought to, charge each such offence so as to meet every possible view of the case. But only one offence has been committed, and the punishment must not exceed that applicable to the graver offence (s. 71, cl. 2).

"It is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided"[7].

Cases.—An accused person cannot be punished at the same time for committing an offence by fire with intent to destroy a warehouse (s. 436) and for the offence of mischief by fire (s. 435)[8]. Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, it was held that she could not be convicted and punished under s. 304 and also under s. 317, but under s. 304 only[9].

A person cannot be punished for rioting and also for being a member of an unlawful assembly[10]; for rioting and for wrongful confinement, when the common object of the unlawful assembly is the wrongful confinement[11]; for rioting and

[1] (1893) P. R. No. 31 of 1894.
[2] *Tokha*, (1895) P. R. No. 8 of 1895.
[3] *Bhugwan Singh*, (1900) P. R. No. 4 of 1901, F.B.; *Mangal Singh*, (1916) P. R. No. 31 of 1916. In *Manak Chand*, (1926) 27 Cr. L. J. 834, separate sentences under ss. 147 and 353 were declared illegal. The Oudh Chief Court is of opinion that separate sentences under ss. 147 and 452 are legal: *Sheo Nath*, (1926) 27 Cr. L. J. 1172.
[4] *Rahman*, (1926) 27 Cr. L. J. 824.
[5] *Ali Akbar*, (1928) 30 Cr. L. J. 575.
[6] *Nga Son Min*, (1923) 3 B. L. J. 49.
[7] Per West, J., in *Dod Basaya*, (1874) 11 B. H. C. 13, 15; *Francis Xavier*, (1890) Unrep. Cr. C. 506.
[8] *Dod Basaya*, sup.
[9] *Banni*, (1879) 2 All. 349.
[10] *Meelan Khalifa* v. *Dwarkanath Goopto*, (1864) 1 W. R. (Cr.) 7.
[11] *Alim Sheikh* v. *Shahazada Singh Burkundaz*, (1904) 8 C. W. N. 483; *Ameeruddi Pramanick*, (1924) 40 C. L. J. 306.

assaulting a public servant in execution of his duty when the offence of assaulting was the common object of the unlawful assembly[1], for rioting with the common object of causing hurt and also for causing hurt[2], for rioting with the common object of committing theft and also for theft[3], for causing grievous hurt by a [illegible]

homicide and for being a member of an unlawful assembly armed with deadly weapons[8], for abetment of abduction of a woman (ss 109 and 498) and for her wrongful confinement (s 343)[9] for dishonestly receiving stolen property (s 411) and for assisting in the concealment of stolen property (s 414)[10], for abducting a child with intent dishonestly to take movable property (s 369) and also for the theft of a part of the movable property (s 379) which he intended dishonestly to take by means of the abduction[11], for kidnapping with intent secretly and wrongfully to confine a person (s 365) and also for putting a person in fear of death or of grievous hurt in order to commit extortion[12], for distilling spirit and possessing the spirit obtained by such distillation[13], and for performing a part in the process of counterfeiting King's coin (s 232) and for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin[14]

IV. Sometimes an act, which is itself an offence, becomes either a different offence, or an aggravated form of the same offence when combined with other facts, either in themselves innocent or criminal Here also it may be proper not [illegible] inor offences [illegible] punishment [illegible] 'or instance, upon the same facts A may be charged for using criminal force under s 352 and under s 152 for the same force against a public servant But though convicted on both charges, he could not receive a higher punishment than that which is provided by the latter section

In *Queen Empress* v. *Malu Arjun*[15] a Full Bench of the Bombay High Court held (1) that a person, who has committed house breaking in order to commit theft (s 457) and theft (s 380), can be charged with, and convicted of, each of these

[1] *Hriday Mondal* v *Jagananda Das* (1899) 4 C. W N 245

[illegible]

(Gap No) (Cr) 21

[illegible]

Sreemunt Adup (1865) 2 W R (Cr) 63, *Bichuk Aheer* v *Auhuel Bhooneea*, (1866) 6 W R (Cr) 5, *Kashee Nath Chungoo* (1867) 8 W R (Cr) 81, *Shama Sheil* (1867) 8 W R (Cr) 35, *Juglal* (1868) 9 W R (Cr) 5, *Radhakanth Laul*, (1868) 9 W R (Cr) 12, *Seeb Churn Haree*, (1869) 11 W R (Cr) 12, *Chunder Kant Lahoree* (1869) 12 W R (Cr) 2, *Nilruttun Sein* (1871) 16 W R (Cr) 45, *Kalisankar Sandyal* (1889) 3 Beng L R. [illegible]

[15] (1899) 1 Bom L R 142, 143 23 Bom 706, F B followed in *Wadhawa* (1917) P R. No 46 of 1917 See *Anvarkhan*, (1872) 9 B H C. 172, F B, *Gulam Abas*, (1875) 12 B H C. 147, *Tulaya bin T* [illegible] 1 Bom 214, *Sakharam Bhau* (1 [illegible] 493

offences; (2) that a Court, in awarding punishment (under this section), should pass one sentence for either of the offences in question, and not a separate one for each offence; (3) that if two sentences are nevertheless passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an *irregularity* only and not an *illegality*. The Court pointedly remarked: "We are also of opinion that, looking at the illustration and explanation added to s. 35 of the Criminal Procedure Code, 1898, it is the intention of the legislature that a Court, in awarding punishment under the provisions of s. 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence". The illustration and explanation added to s. 35 by Act V of 1898 are now repealed by Act XVIII of 1923 and the word 'distinct' in s. 35 is also deleted. The statement of Objects and Reasons stated: "The existing Explanation and Illustration to s. 35 have occasioned considerable misunderstanding. It is therefore proposed to omit them and state definitely that s. 35 must be read subject to s. 71". Points (2) and (3) of the decision in *Malu Arjun* are rendered obsolete by the amendment of s. 35, Criminal Procedure Code. The Court may now award separate sentences for offences under s. 457 and s. 382[1].

The Calcutta High Court held that house-breaking by night and theft form a single and an entire offence and cannot be punished separately[2]. In one case[3], it held that a person may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though, if the Judge considers the punishment for the first sufficient, he need not award any additional sentence for the second. But the infliction of separate punishment does not violate the law, provided that the aggregate punishment awarded is not in excess of what the Court could inflict for either of the offences[4]. These decisions are no longer of any authority in view of the amended s. 35 of the Code of Criminal Procedure. Recently the Calcutta High Court has considered the effect of the amendment of s. 35, Criminal Procedure Code, and has held that where a person is convicted at one trial of the offence of house-breaking with intent to commit theft (s. 457) and of the commission of theft after such house-breaking (s. 380), he can be sentenced to separate sentences in respect of each of those offences. The Court observed: "Under the Code of 1898, the Court would not have had power to punish the offender for more than one of these offences. But under the present Code no reference is made to distinct or separable offences, and it is not necessary to consider whether the offence of house-breaking with intent to commit theft and the commission of theft after such house-breaking are distinct offences. For the application of s. 35, we have now only to consider whether the offences are of the nature described in s. 71 of the Indian Penal Code so that the punishment for more than one of the offences is forbidden by that section. Section 71 is in the following terms. The first paragraph provides....It cannot be said that either the house-breaking by night with intent to commit an offence or theft from a dwelling house are offences made up of parts. The offence of house-breaking with intent to commit theft is complete as soon as the house-breaking with that intent is committed. The offender would be liable to conviction even if he was frightened away after breaking into the house without committing theft. Also theft from a dwelling house can be committed without breaking into the house. The next paragraph of s. 71 is as follows....Here there is no case of offences falling within two or more separate definitions. The third paragraph is....Here also the several acts of house-breaking and theft when combined do not constitute a different offence. The case

1 *Dhondi Bapu Bhapkar*, (1906) 8 Bom. L. R. 850, is no longer of any authority.

2 *Tonaokoch*, (1865) 2 W. R. (Cr.) 63; *Chytun Boura*. (1866) 5 W. R. (Cr.) 49; *Jogeen Pullee v. Nobo Pullee*, (1865) 6 W. R. (Cr.) 49; *Mussahur Daoudh*, (1866) 6 W. R. (Cr.) 92; *Sahrae*, (1867) 8 W. R. (Cr.) 31.

3 *Tincource*, (1864) W. R. (Gap No.) (Cr.) 31.

4 *Fakira Khan*, (1905) 4 C. L. J. 90.

that section the punishments for two offences of which a person is convicted at one trial are to commence one after the expiration of the other unless the Court directs that such punishments shall run concurrently"[1].

The Patna High Court has followed the earlier decisions of the Calcutta

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be punished for the theft of a part of the movable property which he intended dishonestly to take through means of the abduction[3] Under the present law he can be punished separately and the decision is obsolete

for such offences collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination"[4] This view was approved of in a later case in which it was laid down that where more offences than one are proved in respect of which the accused has been charged and tried a conviction for each offence must follow, whether this section applies to the case or not, and, subject to the provisions of this section, a separate sentence must be passed in respect of each such conviction In this case the accused were tried for offences under ss 170 and 383, committed in the same transaction and it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion It was held that the former offence was

each offence

case[6] was not

in the course

perpetrated

several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute,

the conviction and sentence on the gravest offence proved". In this case a person who broke into a house by night and committed theft therein was charged and tried for offences under ss 380 and 457, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months The High Court convicted him of the offence under s 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s 380 This case was decided under the Criminal Procedure Code of 1872 (Act X of 1872)

1 *Kanchan Molla*, (1925) 41 C. L. J 563, 565

2 *Malhru Dusadh* (1926) 5 Pat 464

3 *Nowjan*, (1874) 7 M H. C 375

4 *Budh Singh*, (1879) 2 All 101, 104

5 *Wazir Jan* (1887) 10 All 58

6 (1880) 2 All 644, 646

imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft, and theft, the two offences forming part of the same transaction, and being tried together. But a Sessions Judge trying such a case would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454, and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft[1]. These decisions are no longer of any authority in view of the amended s. 35 of the Code of Criminal Procedure.

The offence of a public servant framing an incorrect document with intent to cause injury under s. 167 is included in the offence of forging a document and using it as genuine under ss. 467 and 471, and a conviction both under the provisions of s. 167 and ss. 467-471 is not maintainable[2].

Amendment.—The last three clauses of this section were added by Act VIII of 1882, s. 4.

Attempt and abetment.—A person cannot be separately punished for attempting as well as for abetting the same offence[3].

PRACTICE.

A Magistrate of the second class convicted the accused under several sections and sentenced them to several terms amounting to nine months. It was held that this section did not apply and the Magistrate was empowered to pass separate sentences for different offences[4].

Upper Burma Rule.—When a person is convicted at one trial of two or more offences, it is not necessary for the Court to pass a sentence for each offence, the first sentence of paragraph 1 of s. 35 of the Code of Criminal Procedure being permissive, not mandatory[5].

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful[1] of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

COMMENT.

The authors of the Code observe: "This provision is intended to prevent an offender whose guilt is fully established from eluding punishment, on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

"Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder; but which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer

1 *Zor Singh*, (1887) 10 All. 146.
2 *Gulzari Lal*, (1926) 3 O. W. N. 760.
3 *Fatehkhan Bahadurkhan*, (1906) 8 Bom. L. R. 855.
4 *Dharam Das*, (1910) 7 A. L. J. 910.
5 U. B. C. M., s. 138.

both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable It appears to us that a conviction in the alternative has this recommendation, tha
sonant to the truth of the
or of aiding murder, the
occasions, but especially in judicial proceedings, there is a strong presumption in favour of literal truth If the Court finds that A has either murdered Z or aided B to murder Z, and that B has either murdered Z or aided A to murder Z, the Court finds that which is the literal truth, nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment

'It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt It will often be certain that there has been a fraudulent appropriation of property, and the only doubt will be, whether this fraudulent appropriation was a theft or a criminal breach of trust To allow the offender to escape unpunished on account of such a doubt would be absurd To subject him to the punishment of theft, which is the higher of the two crimes, between which the doubt lies would be grossly unjust The punishment to which he ought to be liable is evidently that of criminal breach of trust, but that a Court should convict an offender of a criminal breach of trust, when the opinion of the Court perhaps is, that it is an even chance, (
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form of expression which accurately sets forth the real state of the facts In the case which we have supposed, the real state of the facts is, that the offender has certainly committed either theft or criminal breach of trust, and that the Court does not know which This ought, therefore, in our opinion, to be the form of the judgment"[1]

1 **'Doubtful'**—This section does not apply to a case where the doubt is only as to the existence of particular facts It applies to cases in which the law
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being on a matter of law only[2] To authorize a conviction under this section the doubt must, therefore, be as to which of the offences the accused has committed, not whether he has committed either

PRACTICE

Procedure—The Criminal Procedure Code[3] says "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences" The illustrations clearly bring out the purport of

charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating A states on oath before the Magistrate that he saw B

[1] Note A pp 105 106

[2] *Khan Muhammad*, (1887) P R No 11 of 1887 *Jamurha*, (1875) 7 N W P 137

[3] Section 236

hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

When the conviction is under the Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgments in the alternative[1].

Punishment.—When an accused person is convicted in the alternative, one of the offences of which he might be guilty being murder, punishable under s. 302, this section so far overrides s. 302 as to admit in such a case of a less punishment than transportation for life being inflicted[2].

Solitary confinement.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion[1] or portions of the imprisonment to which he is sentenced, not exceeding three months[2] in the whole, according to the following scale, that is to say—

a time not exceeding one month[3] if the term of imprisonment shall not exceed six months:

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year:

a time not exceeding three months if the term of imprisonment shall exceed one year.

COMMENT.

Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

This section gives the scale according to which solitary confinement may be inflicted. In England the power to impose solitary punishment, though it was very rarely exercised by a criminal Court as part of its sentence, has been done away with by 56 & 57 Vic., c. 54. Under the section solitary confinement can only be inflicted where the Court has power to sentence an offender to rigorous imprisonment.

1. **'Any portion'.**—These words imply that the solitary confinement if inflicted for the whole term of imprisonment is illegal[3]. A prisoner was convicted of hurt and sentenced to fourteen days' rigorous imprisonment, the whole of which was ordered to be passed in solitary confinement. The High Court quashed the order as illegal[4].

2. **'Not exceeding three months'.**—In the case of simultaneous convictions, the award of separate terms of solitary confinement, which in the aggregate exceed three months, is legal[5]; but, as a matter of practice, a sentence of more than

[1] Section 367 (3), Criminal Procedure Code.
[2] *Sahel Singh,* (1906) 26 A. W. N. 93.
[3] *Nyan Suk Mether,* (1869) 3 Beng. L. R. (A. Cr. J.) 49.
[4] *Ibid.*
[5] *Nihala,* (1877) P. R. No. 11 of 1877; *Khushal,* (1877) P. R. No. 13 of 1877.

three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence And, in a later case[1], in which none of these cases was referred to, it was held that such a sentence should not be passed[2]. The Rangoon High Court has laid down that cumulative sentences of solitary confinement are contrary to the intention of this section[3] Under this section solitary confinement must be a portion of the substantive sentence of rigorous imprisonment, and where the substantive sentences are two periods of rigorous imprison

3 **'One month'.**—One month signifies thirty days[5]

Summary trial.—It is not illegal to impose solitary confinement as a part of the sentence in a case tried summarily[6]

Solitary confinement not to be awarded for offences under special or local Acts—It is only for offences under the Penal Code that solitary confinement can be awarded[7].

Solitary confinement for imprisonment in lieu of fine.—Where imprisonment does not form part of the substantive sentence, solitary confinement cannot be awarded[8], so also, it cannot be awarded as part of the imprisonment in lieu of fine[9]

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made to include solitary confinement[10]

Amendment.—The words "shall not exceed one year" were substituted for ' be less than a ' by Act VIII of 1882, s 5

PRACTICE.

Though it is not illegal yet, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence[11]

A Magistrate has no power to direct that solitary confinement should be executed in the first week of every month[12].

It is not enough for a Court to say that the accused is sentenced to the authorised amount of solitary confinement, but the exact period should be clearly mentioned[13] The Court has no power to order when in each month the sentence shall be inflicted

Limit of solitary confinement

74 In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals[1] between the periods

1 *Ibrahim*, (1897) P R No 7 of 1897, *Gurdit Singh*, (1889) P R No 17 of 1889, *Aga Kun Ba*, (1899) P J L B 554, *Baldeo Brahmin*, (1901) 13 C P L R 39, *Budha*, (1923) 46 All 114

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of solitary confinement of not less duration than such periods, and, when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month[2] of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

COMMENT.

Solitary confinement if continued for a long time is sure to produce mental derangement. This section is, therefore, enacted to limit the punishment to fourteen days at a time.

1. **'Fourteen days at a time with intervals'.**—Solitary confinement must be imposed at intervals. A sentence inflicting solitary confinement for the whole term of imprisonment is illegal, though not more than fourteen days is awarded[1]; because the last section provides that the offender shall be kept in solitary confinement for a portion of the imprisonment to which he is sentenced. The whole gist of this section is to prevent any prisoner being kept in solitary confinement continuously or without some break in his punishment.

2. **'Shall not exceed seven days in any one month'.**—This provision limits the solitary confinement, when the substantive sentence exceeds three months, to seven days in any one month. A sentence adjudging that a period of three months out of a term of imprisonment for one year and one day be passed in solitary confinement was held to be illegal, and the Madras High Court reduced the sentence of solitary confinement to eighty-four days[2]. But the former Chief Court of the Punjab held in a case, in which the accused was sentenced to four months' rigorous imprisonment, of which one month was to be passed in solitary confinement, and a fine of Rs. 25 or one month and a half's further rigorous imprisonment in default, that the sentence of one month's solitary confinement was legal notwithstanding that the accused could not lawfully be subjected to more than twenty-eight days' solitary confinement, if the imprisonment continued for only four months[3].

PRACTICE.

Procedure.—Upper Burma Rule.—Cumulative sentences of solitary confinement are illegal; in other words, in a continuous period of imprisonment, solitary confinement for more than three months cannot be judicially awarded[4].

Lower Burma Rule.—The attention of all Courts is called to ss. 73 and 74 of the Indian Penal Code, which provide for sentences of solitary confinement. These sections should be given effect to in all cases in which it is desired to impose a more severe form of punishment than rigorous imprisonment and in the cases mentioned in paragraphs 287 and 288[5].

When any person has undergone a sentence of rigorous imprisonment without the punishment having had a deterrent effect, if he is again convicted and sentenced to rigorous imprisonment, solitary confinement should form part of the sentence, unless there is any special reason for not awarding such punishment[6].

Solitary confinement may also be awarded upon a first conviction for a serious offence. It is usually preferable to impose a moderate term of imprisonment with solitary confinement rather than a longer term without such addition to enhance the severity of the imprisonment. Sentences of solitary confinement passed for separate offences, whether at the same or more than one trial, should not in the aggregate exceed three months[7].

1 *Nyan Suk Mether*, (1869) 3 Beng. L. R. (A. Cr. J.) 49.
2 (1879) 1 Weir 35.
3 *Fatta*, (1878) P. R. No. 7 of 1878.
4 U. B. C. M., s. 101.
5 L. B. C. M., Vol. I, s. 286, p. 81.
6 *Ibid*, s. 287.
7 *Ibid*, s. 288.

75 Whoever, having been convicted[1],—

Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction

(*a*) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards[2], or

(*b*) by a Court or tribunal in the territories of any Native Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government[3] of an offence which would, if committed in British India, have been punishable under those Chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term shall be subject for every such subsequent offence to transportation for life[4], or to imprisonment of either description for a term which may extend to ten years

COMMENT.

This section was introduced by Act III of 1910 in the place of the old one In introducing the Bill to amend the old section it was said The object of the Bill is to amend s 75 of the Indian Penal Code so as to enable Courts in British India to recognise for the purposes of that section previous convictions by the various Courts or tribunals in the territories of Native States which exercise their jurisdiction under the general or special authority of the Government of India or of a Local Government As the law at present stands a person who having been convicted by any such Court is subsequently convicted by a Court in British India is not liable to the punishment to which he would have been liable if the previous conviction had been obtained in British India

'This state of the law has been found to cause serious practical difficulties more especially in dealing with habitual offenders and the amendment proposed in the Bill is designed to remove these difficulties by including convictions by such Court within the scope of the section referred to [1]

Object —The object of this section is to provide for an additional sentence not for a less severe sentence on a second conviction Recourse should not be had to it if the punishment provided for the offence is itself sufficient[2] This section only enables a Court to pass a sentence commensurate with the gravity of the offence[3]

Scope —This section applies to cases in which it is intended to pass sentences more severe than those provided in the Code for the particular offence charged But that does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Code[4]

This section is not to be employed to enhance enormously the heinousness of petty offences[5]

[1] G I 1910 Part V p 1

[2] [illegible]

Guhi Jena (1908) 12 C W N lxxxiii *Kasim Ali* (1908) P W P (Cr) No 23 of 1908 7 Cr L J 293 *Jowahir Singh* (1913) P L R No 4 of 1914 P W R (Cr) No 3 of 1914, *Daya Ram* (1920) 30 P L R 530

Value of property stolen is no test.—"Too much importance is very generally attached to the value of the property stolen in awarding sentences. The value of the property stolen is very often a mere accident, and the important question is the intention of the man, and his character and attitude towards society"[1].

Attempt.—This section does not apply to cases of attempts not specially made offences in Chapters XII and XVII of the Code[2]. Penal statutes are construed strictly; so Chapter XXIII relating to attempts cannot be included within the purview of this section when it specially mentions Chapters XII and XVII. This section does not, therefore, apply to cases which are confined to s. 511 of the Code. The offences which fall under s. 511 must be punished entirely irrespective of this section[3].

Abetment.—The previous conviction of an accused for an offence under Chapters XII and XVII cannot be taken into consideration at a subsequent conviction for abetment of an offence under those Chapters for the purpose of enhancing punishment under this section[4].

Offence under a special or local law.—The provisions of this section are confined to offences punishable under the Code only[5]. Where special Acts of Legislature intend enhanced punishment after previous conviction they have specific provisions[6].

Conviction under a foreign law.—A conviction under the law of a foreign State which has adopted the Indian Penal Code for the guidance of its Courts is not such a conviction as is intended by this section[7].

Amendment.—By Act X of 1886, s. 22, the words "or to imprisonment of either description for a term which may extend to ten years" were substituted for "or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years"[8]. The present section was substituted by Act III of 1910.

See also Kachin Hill-tribes Regulation (I of 1895), ss. 1 (3), 3, and Chin Hills Regulation (V of 1896) for the additional s. 75-A in force in those districts.

PRACTICE.

Evidence.—The evidence as to a previous conviction against the accused under the Penal Code must be clear and precise[9]. It is the duty of the prosecution to bring to the notice of the Court the existence of previous conviction[10]. A previous conviction can be proved—(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such

1 Per Clark, C. J., in *Nur Din*, (1903) P. R. No. 28 of 1903.

2 *Damu Haree*, (1874) 21 W. R. (Cr.) 35; *Nana Rahim*, (1880) 5 Bom. 140; *Ram Dayal*, (1881) 3 All. 773; *Sricharan Bauri*, (1887) 14 Cal. 357; (1868) 1 Weir 36; *Motawel Pakuran*, (1888) 1 Weir 37; *Deva Singh*, (1872) P. R. No. 27 of 1872; *Nihal Singh*, (1882) P. R. No. 37 of 1882; *Fattu*, (1884) P. R. No. 34 of 1884; *Harnam*, (1907) P. R. No. 17 of 1907; *Mohammed Hussain*, (1927) 29 P. L. R. 54; *Ramnath Bhoi*, (1901) 14 C. P. L. R. 72; *Banne*, (1921) 24 O. C. 260, 22 Cr. L. J. 750; *Brij Behari Lal*, (1925) 23 A. L. J. 926.

3 *Bharosa*, (1895) 17 All. 123; *Ajudhia*, (1895) 17 All. 120; *Motawel Pakuran*, sup.; *Jhamman Lal*, (1906) P. R. No. 14 of 1906; *Ghasita*, (1918) P. R. No. 13 of 1919.

4 *Kashia Antoo*, (1907) 10 Bom. L. R. 26.

5 *Moluck Chand Khalifa*, (1865) 3 W. R. (Cr.) 17; *Hurpaul*, (1865) 4 W. R. (Cr.) 9; *Budhun Rujwar*, (1882) 10 C. L. R. 392; (1877) 1 Weir 39; *Khan Muhammad*, (1904) P. R. No. 17 of 1904; *Lalsing*, (1893) 7 C. P. L. R. 24.

6 *Vide* The Burma Excise Act (Burma Act V of 1917), s. 46.

7 *Muhammad Yar*, (1883) P. R. No. 2 of 1884; *Venkatai Shetti*, (1889) 1 Weir 40.

8 *Gopala Santu*, (1876) Unrep. Cr. C. 117, and *Mahadu*, (1882) 6 Bom. 690, are no longer of any authority.

9 *Naimuddi Sheikh*, (1870) 14 W. R. (Cr.) 7. *Abdul Malik*, (1929) 30 L. W. 180.

10 *Prem*, [1929] A. L. J. R. 397.

which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted[1]

Procedure —The following procedure is to be observed in the case of trial of persons previously convicted of offences against coinage, stamp law or property—

(1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards shall if ... here are sufficient ... f Session or High ... try the case and ... e accused is con victed Provided that, if any Magistrate in the District has been invested with powers under s 30, the case may be transferred to him instead of being committed to the Court of Session

(2) When any person is committed to the Court of Session or High Court under sub s (1) any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under s 209[2]

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(a) by ... 489 A, s 489 B, s ... punish able under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court Court of Session Presidency Magistrate District Magistrate, Sub divisional ... or Magistrate may, if it or ... sportation or imprisonment ... change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence

(2) If such conviction is set aside on appeal or otherwise such order shall become void

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

(5) Any person against whom an order has been made under this section ... deemed ... give a

[1] Criminal Procedure Code, s 511, *Feroze* ... 30 P L R 530 ... *Khan* (1925) 26 P L R 843, *Daya Ram*, (1929) [2] *Ibid* s 348

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated[1].

Jurisdiction.—A Magistrate cannot award punishment beyond his powers (as specified in s. 32, Criminal Procedure Code) because the offender has been previously convicted[2]. If he considers that a more severe sentence than he is is empowered to pass is necessary, he should commit the prisoner to the Court of Session[3].

Lahore Rule.—1. Under s. 75 of the Indian Penal Code, a person convicted a second time of an offence punishable, under Chapter XII or Chapter XVII of the Code, with three years' imprisonment and upwards, is liable to a greatly enhanced sentence.

2. This, of course, does not increase the competence of the Court trying the offender; but s. 348 of the Code of Criminal Procedure gives the Magistrate a discretion to try the case himself, if, in his opinion, an adequate sentence can be passed by him. If the Magistrate is unable adequately to punish the accused person, he should commit such person to the Court of Session, or High Court; or transfer the case for trial to the Magistrate of the District invested with powers under s. 30. A provision is also contained in s. 347, which enables a commitment to be made to the Court of Session at any stage before judgment is signed.

3. Every case in which the accused person is liable to enhanced punishment should be seen, in the first instance, by the Magistrate of the District, and, in the event of his not considering it necessary to try it himself, he should send it to a specially selected Magistrate for trial, if possible to one with powers under s. 565. Criminal Procedure Code, and should direct the Magistrate's attention to s. 348 of the Code of Criminal Procedure and s. 75 of the Indian Penal Code.

4. Where a Magistrate of the first class finds he is unable to punish any offender adequately, he should submit the case to the District Magistrate with a view to its transfer for trial by a Magistrate with powers under s. 30 of the Criminal Procedure Code. Cases in which a Magistrate with powers under s. 30 of the Criminal Procedure Code cannot pass an adequate sentence should be committed to the Court of Session.

5. Ordinarily, every case in which there are two previous convictions should be tried by a Magistrate with powers under s. 30, and also those cases of single previous convictions where the previous conviction was of a serious offence, such as burglary, or where in the previous case there was a sentence of more than one year's rigorous imprisonment.

Where there have been four or five previous convictions of offences against property or where the aggregate of previous sentences amounts to four or five years' imprisonment, and the Magistrate is satisfied that a case has been made out for charging the accused, he should consider very carefully the question whether the case should be committed to the Court of Session, and, if pressed by the Public Prosecutor to commit, he should ordinarily do so. If he commits, he should record clearly his reasons for not disposing of the case himself. Sessions Judges should keep in view the necessity of transporting for life incorrigible offenders, men whose previous convictions show that they are preying on society, and of whose reform there is no reasonable expectation.

In determining what sentences should be passed on previous convicts, Courts should freely refer to the judgments in their previous convictions, the facts in which

1 Criminal Procedure Code, s. 565.

2 *Vithya,* (1871) Unrep. Cr. C. 49; *David Narsu,* (1904) 6 Bom. L. R. 548; (1870) 6 M. H. C. App. 2; (1865) 1 Weir 36; *Gulab Hamir,* (1894) Unrep. Cr. C. 688; *Bahadur Khan,* (1872) P. R. No. 31 of 1872; *Nga Tun Tha,* (1894) P. J. L. B. 78.

3 *Ganu Ladu,* (1864) 2 B. H. C. R. 126; *Khalak,* (1889) 11 All. 393.

will often help to ascertain the characters of the convicts and whether there is any reasonable probability of their reform

lieu of imprisonment under
ear in mind that the provisions
dian Penal Code and 34 of the

Code of Criminal Procedure

sufficient At the same time, in resorting to this section, it must be remembered that when the accused appears to be an habitual offender he must ordinarily be dealt with under the provisions of s 348, and be sent to the District Magistrate for trial under s 30, or be committed to the Court of Session

8 It is the duty of the Police, in conducting the investigation, to take proper steps to establish the identity of an accused person and to obtain and produce evidence of previous convictions against him The attention of Criminal Courts is directed to the decision of the Chief Court in the case of *Empress* v *Sham Singh*[1] and especially to the remarks of Mr Justice Plowden at page 70 of the *Record*, with regard to the duties of the Magistrate and of the Police in this matter It will be seen that the discovery, subsequent to sentence, that the

the Criminal Courts of the Province were instructed to enter any previous con viction or convictions of a prisoner upon the warrant committing him to jail, and the attention of all Magistrates is directed to these instructions In the form of warrant of commitment prescribed for use under the Code of Criminal Procedure, provision has been made for mention of the fact that the convict has been previously convicted, when one or more previous convictions have been proved against him at his trial, and for the entry of the particulars of the previous convictions in a separate statement, which should be attached to the warrant of commitment in such cases

It is further directed, at the suggestion of the Inspector General of Police, and with the sanction of the Local Government, that Magistrates, when committing a prisoner to jail, will enter a note in red ink on the warrant of commitment, in cases where the identity of the prisoner has not been satisfactorily ascertained, or he declines to give an account of himself[2].

Upper Burma Rule —Apart from the question whether a previous conviction affects the punishment which a Court is competent to award, it is the duty of a Court, whenever a previous conviction is brought to its notice, to consider the nature of the conviction and, if it is of opinion that it constitutes a proper ground for passing a severer sentence than the Court would otherwise pass for the offence for which the accused is being tried, it should take evidence as to the previous conviction, and it may enter the previous conviction in the charge in order that the accused may understand that it will be taken into consideration in passing sentence, but the charge should not refer to the special provisions under which enhanced punishment can be awarded unless the Court trying the accused is com petent to award such punishment[3]

Accused persons who have been previously convicted of offences punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for three years or more, and who are again prosecuted for any such offence, should

1 (1884) P R No 36 of 1884 p 136
2 L H C R & O, Vol II Ch XXXI, 3 U, B C M, s 310

not be tried by a Magistrate of the second or third class without the permission of the District or the Sub-divisional Magistrate[1].

Lower Burma Rule.—Accused persons who have been previously convicted of offences punishable under Chapter XII or Chapter XVII or the Indian Penal Code with imprisonment for three years or more, and who are again prosecuted for any such offence, should not be tried by a Magistrate of the second or third class without the permission of the District or the Sub-divisional Magistrate[2].

In considering whether such permission should be given or not, District and Sub-divisional Magistrates should remember that these cases must, under s. 348, be either committed to the Court of Session or tried throughout by the Magistrate who is finally to dispose of them; and that they cannot be referred for higher punishment under s. 349[3].

When any of the accused has been previously convicted twice or oftener of such an offence, the case should ordinarily be tried by a Magistrate invested with special powers under s. 30, or committed to the Court of Session[4].

If an habitual criminal who is convicted of an offence punishable under Chapters XII and XVII of the Penal Code with three years' imprisonment and upwards after three previous convictions of similar offences is not sentenced to transportation, the reason should be stated[5].

Oudh Rule.—The Government of India has noticed the comparatively small extent to which the provisions of s. 75 of the Indian Penal Code are used in the case of habitual convicts. It has been remarked that the sentence of transportation for life is peculiarly appropriate in the case of persons habitually guilty of offences against property, for whom jail-life in India appears to have no terrors, but who might possibly be reformed if removed from the scene of their crimes. The Judicial Commissioner therefore suggests a more extensive use of the power conferred by s. 75 of the Penal Code[6].

In order to render s. 75 of the Indian Penal Code effective, it has been provided (s. 348, Code of Criminal Procedure) that persons coming within its provisions shall, if the Magistrate considers them habitual offenders, ordinarily be committed to the Court of Session or High Court, or placed on their trial before the District Magistrate who is invested with powers under s. 30, Criminal Procedure Code. It is obvious that the sentence to be passed on such an offender ought in some measure to depend upon the nature of his previous convictions and sentences. Magistrates, therefore, will be expected to use a discretion in making commitment of such offenders[7].

Bengal Rule.—*Date of previous conviction and sentence to be stated in the judgment.*—Whenever an enhanced sentence is passed on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the Sessions Judge or Magistrate shall state in his judgment the date of each previous conviction and the sentence passed, as well as the particular offence charged[8].

Allahabad Rule.—In a case to which the provisions of s. 75 of the Indian Penal Code apply, the Court, if it convicts the accused, shall set forth in its judgment each previous conviction, proved against or admitted by the accused, specifying the date of the conviction, the section under which it was had, and the sentence imposed[9].

Patna Circular.—Whenever an enhanced sentence is passed upon an accused on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the

1 U. B. C. M., s. 238.
2 L. B. C. M., Vol. I, s. 234.
3 *Ibid*, s. 235.
4 *Ibid*, s. 236.
5 *Ibid*, s. 237.
6 O. C. D., s. 68.
7 *Ibid*, s. 62.
8 C. H. C. R. & O., Vol. I, Ch. I, s. 99.
9 A. H. C. G. R. (Cr.) Ch. 8, r. 3.

Sessions Judge should enter in the column for remarks the date of each previous conviction, the offence charged, and the sentence passed on each occasion[1]

Punishment.—No distinct sentence of imprisonment is awardable on account of a previous conviction as it is not in itself an offence It is merely a circumstance rendering the offender, convicted of a subsequent offence, liable to a larger measure of punishment[2] The appellant, after four previous convictions for theft, was sentenced for a fifth theft of property of no great value to seven years' trasportation It was held that the sentence was not excessive[3] A sentence should never be heavier than is necessary to deter the criminal from committing the offence again In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions had against them This section and s 221 of the Code of Criminal Procedure are not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction[4] This section gives no authority for passing a sentence of whipping in addition to any other punishment[5]

A Sessions Judge cannot (under this section or otherwise), by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted[6]

Where a previous conviction is proved, the prisoner cannot be dealt with under s 35, Criminal Procedure Code, as if he had been convicted of two offences[7]

Record of previous conviction—Records of previous conviction should not be put in until the close of the trial as they can only be used after conviction in determining the measure of punishment[8] In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure shall be as follows, namely —

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence

(b) In the case of a trial held with the aid of assessors the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction[9]

But evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872[10]

Charge—If the accused having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge If such statement has

1 Pat. H C Cr C para 40, p 18

2 (1868) 1 Weir 36, (1878) 1 Weir 37, *Gulab Hamir*, (1894) Unrep Cr C 688, (1870) 6 M H C App 2

3 *Nga Kan Tha*, (1895) 1 U B R (1892 1896) 147

4 *Po Nyein*, (1917) 9 L. B R 167

5 *Nga Tun Tha*, (1894) P J L. B 78

6 *Salya valad Karji*, (1868) 5 B H C (Cr C) 36

7 [illegible]

been omitted, the Court may add it at any time before sentence is passed[1]. But it cannot do so after it is passed[2]. The fact, date and place, of the previous conviction must be stated severally, otherwise the accused is not amenable to the terms of this section[3]. A charge of having committed the offence after a prevous conviction, therefore, should contain an allegation that the offence has been committed after a previous conviction. A statement in account that, at the time when the prisoner committed the offence (no offence having been mentioned specifically in the count), he had been previously convicted of offences punishable under Chapter XVII of the Penal Code, is not sufficient[4]. A separate charge under s. 75 of the Penal Code must be framed and recorded if the prisoner is to be tried for an offence punishable under it[5].

The charge after a previous conviction should run thus:—

I (*name and office of the Magistrate, etc.*) hereby charge you——as follows:

That you, on or about the——day of——, at——, committed——and thereby committed an offence punishable under section——of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And you, the said——, stand further charged that you, before the committing of the said offence, had been convicted on the——day of——in Calendar No.—of——on the file of——of an offence punishable under Chapter XII (*or* XVII) of the Indian Penal Code with imprisonment for a term of three years, to wit, the offence of——, which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under s. 75 of the Indian Penal Code.

And I hereby direct that you be tried by the said High Court (*or* the Court of Session) on the said charge.

In all cases in which a previous conviction of any offence would render an accused person liable, if convicted on the charges for which he is under trial, to the penalty of whipping as an additional punishment, and it is intended to prove such previous conviction for the purpose of affecting the punishment to be awarded, the Court trying the accused person shall draw up a distinct charge specifying the liability to whipping as an additional punishment and how it rises.

The charge should be to the following effect:—

That at a date previous to the date of the offence of——now charged against you——viz., on the——you——were convicted by the Court of——of the offence of——specified in s. 3 or 4 of the Whipping Act (IV of 1909) and that this conviction of——is still in full force and effect and being a conviction for the same specific offence as that now charged against you, renders you liable in case you should now be again convicted of——to the punishment of whipping in addition to the punishment provided for the said offence by the Indian Penal Code.

Madras Rule.—If it is proposed to prove several previous convictions against an accused person for the purpose of affecting his punishment, they should not be lumped in one head of charge, but should be set forth separately, each under a distinct head of charge[6].

The Central Provinces Circular.—It seems necessary to point out that all convictions on record at the date of the charge are not always to be reckoned as previous convictions for the purposes of s. 75 of the Indian Penal Code or ss. 3 and 4 of Act VI of 1864. A previous conviction for the purpose of affecting the punishment which a Court is competent to award is a conviction the penalty following which had been undergone by the accused (in whole or in part) at the time when he committed the offence for which he is being tried.

1 Section 221 (7), Criminal Procedure Code.
2 *Rajcoomar Bose*, (1873) 19 W. R. (Cr.) 41.
3 *Haidar*, (1883) 3 A. W. N. 110; *Abbulu*, (1909) 7 M. L. T. 77.
4 *Sheik Jakir*, (1874) 22 W. R. (Cr.) 39.
5 *Dorasami*, (1886) 9 Mad. 284; *Dungri*, (1911) P. W. R. (Cr.) No. 40 of 1911.
6 M. H. C. R. P., s. 166.

When a person has been committed at or about the same time of more offences than one and after undergoing the accumulated penalties for those offences commits another offence and is again convicted, each of the previous convictions is a separate conviction in relation to the present conviction

It is not necessary to state previous convictions in the charge unless it is intended to prove them for the purpose of affecting the punishment which the Court is *competent* to award, that is, in order to render the accused liable to a sentence which could not otherwise have been passed under the law, such as an enhanced sentence under the provisions of s 75 of the Indian Penal Code, or a sentence of whipping, in addition to other punishment under Act VI of 1864

Where previous convictions are used, not for the purpose of affecting the punishment to which the accused is *legally liable*, but merely to influence the Court in determining the amount of punishment which it shall award, though they need

not admitted

uded by the

temporarily

n arrived at

therein The order sheet should then show that the accused is questioned as to certain previous convictions alleged but not up to that stage admissible in evidence, the actual questions and answers being recorded as a postcript to the examination made under s 342, Criminal Procedure Code Whether these convictions are admitted or denied, the documents constituting legal proof of them will of course be filed with the record Finally, the judgment will be completed and the printed sheet for finding and sentence will then be filled up[1].

[1] C. P (Cr C) (1929), Part I, Cir 20, ss 4, 5, 6 and 7

CHAPTER IV.

GENERAL EXCEPTIONS.

"This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions....Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters. ....It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter"[1].

The word 'offence' in this Chapter denotes a thing punishable under the Code, or under any special or local law (s. 40).

This Chapter applies to offences punishable under ss. 121-A, 124-A, 225-A, 225-B, 294-A and 304-A[2].

Onus of proving an exception lies on the accused.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances[3].

Where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions he cannot, in appeal, set up a case, upon the evidence taken at his trial, that his act came within such general exception: the circumstances which would bring the case of an accused person within any of the general exceptions can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record. In the absence of such evidence the Court is not competent to assume the existence of those circumstances, more particularly when the pleas taken are inconsistent with the assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the doubt[4].

Act done by a person bound, or by mistake of fact believing himself bound by law.

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact[1] and not by reason of a mistake of law[2] in good faith believes himself to be, bound by law[3] to do it.

ILLUSTRATIONS.

(*a*) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(*b*) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

[1] Note B., p. 106.

[2] Act XXVII of 1870, s. 13, as amended by Act XII of 1891.

[3] The Indian Evidence Act, I of 1872, s. 105; *Shibo Prosad Pandah*, (1878) 4 Cal. 124; *Dwijendra Chandra*, (1915) 19 C. W. N. 1043.

[4] *Wajid Husain*, (1910) 7 A. L. J. 438.

COMMENT.

No more is meant by this section than to excuse a perso what by law is an offence, under a misconception of facts, leading in good faith that he was commanded by law to do it It is based *ignorantia facti excusat* See Comment on s 79, *infra*

Scope —This and the following three sections leave untouched in a civil suit of the persons who claim their benefit

1. **'Mistake of fact'.**—See Comment under s 79 *infra*

2. **'Mistake of law'.**—See Comment under s 79, *infra*

3. **'In good faith believes himself to be, bound by law'** —In re to this section, Rattigan J observed "To entitle a person to claim the b of that section (s 76) it is necessary to show the existence of a state of which would justify the belief in good faith, interpreting the latter expression w reference to Section 52 that the person to whom the order was given was boun by law to obey it Thus in the case o fa soldier, the Penal Code does not recogniz the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible lik

have committed it under the

authorized to issue the order

in good faith on a question of fact Such a construction of the law may indeed subject the soldier to military penalties, and, in certain cases place him in the to obey an order which he believed to be unjusti himself liable to military law or, by obeying it criminal law of the land But on a balance of considerations the Legislature has deemed it wise for the safety of the community that no special exemption should be allowed to a soldier who commits what would ordinarily be a penal offence from that enjoyed by any other person, who does the same act believing in good faith that he is bound by law to do it A mistake of law

of puni

soldier

safety,

is one which affects the person or property of another In such a case the *civil* law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief that he is bound by law to obey the command of his superior"[1] Alison in his Principles of the Criminal Law of Scotland[2], says "The express command of a Magistrate or officer will exonerate an inferior officer or soldier, unless the com mand be to do something plainly illegal or beyond his known duty If through gross ignorance, or neglect or design, a Judge or Magistrate pronounce an unlawful sentence, what shall be said of the officers or others who carry it into execution?

If the order or warrant was plainly illegal, as, for example, to strangle a prisoner in jail or to poison him or the like, certainly the mere possession of such a warrant will not prevent the officer who wickedly yields it obedience from being held as art and part in the legal murder, and suffering for its commission But on the other hand, if the error was in such a part of the proceedings, as the officer entrusted with its execution has no opportunity of seeing, and is not called upon

[1] *Niamat Khan* (1883) P R No 17 of 1883 p 30

[2] First edition p

in duty to examine, and if the warrant put into his hands be fair and in ordinary form, certainly he will not be answerable for any illegality or vice in the previous and to him inscrutable proceedings.

"The same distinction is applicable to the case of a soldier acting in obedience to the orders of his superior officer, with this additional circumstance in his favour, that he is not only in a much humbler station, and trained to more implicit obedience than a legal functionary, but subject to a peculiar and peremptory Code of laws, armed with powers of extraordinary severity, for the express purpose of enforcing on his part the most implicit obedience to command. It will require, therefore, the very strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits; it is confined to what is commanded in the course of official duty, and which plainly and evidently does not transgress its limits. For what if an officer command a private soldier to commit murder or *to steal, or to aid him in a rape, or if he order a file of soldiers to fire on an inoffensive* multitude, certainly in none of these cases will the privates be exempt from punishment if they yield obedience to such criminal mandates".

For illegal acts, however, neither the orders of a parent nor those of a *master will furnish any defence.*

Liability of private persons to assist the Police.—Private persons bound to assist the Police under s. 42 of the Code of Criminal Procedure would be protected under this section.

CASES.

Lawful arrest of a wrong person.—A police-officer came to Bombay from Kanara with a warrant to arrest a person. After reasonable inquiries he arrested the complainant believing in good faith that he was the person to be arrested. The complainant prosecuted the police-officer for wrongful confinement. It was held that the police-officer was protected by this section and was guilty of no offence[1].

Act done under a superior's order.—Nothing but fear of instant death is the defence for a policeman who tortures any one by the order of a superior. The maxim *respondeat superior* has no application in such a case[2]. Where a Naik and three sepoys of a Regiment were found on the facts to be guilty of culpable homicide not amounting to murder, in that they fired upon a mob which was threatening them under circumstances which did not render the act excusable under this section, and two men were shot dead, it was held that the sepoys, who had fired in obedience to the Naik's order, were not protected by this section, as they were cognizant of all the circumstances of the quarrel, and, there being no room for a mistake of fact, they must be taken to have known that the Naik was wrong in law in firing upon the mob, and that they were not bound to obey his illegal order[3]. A constable verbally ordered two other police constables to arrest bad characters on a road and to fire if resisted. The accused challenged two men and then fired as one of them did not stop and killed one man. It was held that the accused acted unlawfully and should not have been acquitted on a charge of culpable homicide not amounting to murder. A police-officer who commits a wrongful act under the order of his superior officer is liable to punishment as his mistake of law in supposing himself authorized cannot be accepted as a good defence though it may be a ground for mitigation of punishment[4].

1 *Gopalia Kallaiya*, (1923) 26 Bom. L. R. 138, 7 Bom. Cr. C. 128.

2 *Latifkhan*, (1895) 20 Bom. 394.

3 *Gurdit Singh*, (1883) P. R. No. 16 of 1883; *Allah Rakhio*, (1922) 17 S. L. R. 182.

4 *Nga Myat Tha*, (1882) S. J. L. B. 164. The detention by a Monigar of certain persons under the order of a District Magistrate was held to be illegal: *Kampai Gowda*, (1911) 5 Cri. L. Rep. 34.

English cases —A gun discharged in the ordinary and regular course of ball practice b man who was one and open under the command of a superior officer, who was acting in obedience to the general orders of the Major General It was held that the Major General was not guilty of manslaughter[1] A sailor was ordered by his superior officer on board a man of war to prevent boats from approaching the ship and had ammunition given him for that purpose Boats having persisted, after repeated warnings, in approaching the ship, he fired at one and killed a person It was held that this was murder although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship[2] A soldier who commanded the Guards at the trial and execution of Charles I, pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die It was resolved that that was no excuse, for his superior was a traitor and all who joined with him in that act were traitors and where the command is traitorous the obedience to that command is also traitorous[3]

Bound by law.—Where a defamatory statement was made by a person as a witness in a case, but the person was not bound by law to go into the witness box and make it, it was held that this section did not apply[4] On an indictment the manslaughter of o it, it appeared that them, which altered proceed with caution were observing them and they were not obviously illegal, they were not criminally responsible[5]

PRACTICE

Procedure —Punishment —Though ignorance of law is not a defence in law, yet it is a matter to be considered in mitigation of punishment[6]

77. Nothing is an offence which is done by a Judge[1] when acting judicially[2] in the exercise of any power which is, or which in good faith[3] he believes to be, given to him by law.

Act of Judge when acting judicially

COMMENT.

This section protects Judges from criminal process just as the Judicial Officers' Protection Act[7] saves them from civil suits Section 1 of that Act says "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duties, whether or not within the limits of his jurisdiction Provided that he at the time, in good faith, believes of' whereas the Judicial Justice of the Peace,

A L J 846
5 *Trainer* (1864) 4 F & F 105.
6 *Esop* (1836) 7 C & P 456
7 Act XVIII of 1850 s 1

Protection of police-officers from prosecution or action'.—The Police Act[1] says: "When any action or prosecution shall be brought or any proceedings held against any police-officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

"Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine:

"Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section".

Act done by a person justified, or by mistake of fact believing himself justified, by law.

79. Nothing is an offence which is done by any person who is justified by law[1], or who by reason of a mistake of fact[2] and not by reason of a mistake of law[3] in good faith[4], believes himself to be justified by law in doing it.

ILLUSTRATION.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

COMMENT.

Distinction between ss. 76 and 79.—The distinction between s. 76 and this section is that in the former a person is assumed to be bound, and in the latter to be justified by law, in other words, the distinction is between a real or supposed legal obligation and a real or supposed legal justification, in doing the particular act.

"Under both (these sections) there must be a bona fide intention *toad vance the Law*, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law (s. 76) to do as he did, or that being empowered by law (s. 79) to act in the matter, he had acted to the best of his judgment exerted in good faith"[2].

Application of the section to special or local law.—The Madras High Court has held that the plea of justification provided by this section is available only for an offence punishable by the Code and not for offences punishable by any special or local law and hence the belief of the accused that he was justified in his act does not exculpate him from punishment for his guilt under the Forest Act[3]. The Bombay High Court has held otherwise in a case in which the accused, a contractor engaged by the Public Works Department, quarried stones required for a public road, from a place which was pointed out to him by the officers of that department. The place in question was in a protected forest and no permission was taken of the Forest Department for quarrying. The accused was convicted.

1 Act V of 1861, s. 43, and The Madras District Police Act (Mad. Act XXIV of 1859), s. 54. But see The Madras City Police Act (Mad. Act III of 1888), s. 81; the Bombay City Police Act (Bom. Act IV of 1902), s. 140 (3); the Bombay District Police Act (Bom. Act IV of 1890), s. 80 (3); and the Bombay Village Police Act (Bom. Act VIII of 1867), s. 20.

2 1st Rep., s. 114, p. 219.

3 *Lewis*, (1913) 15 Cr. L. J. 171.

under the Indian Forest Act but the High Court quashed the conviction on the ground that the accused was entitled to the protection under this section[1]

1 'Justified by law' —This phrase is used in its proper and strict sense in reference to something needing to be vindicated as being in conformity with law

There is no justification within the meaning of this section for a husband either under the Hindu or Mahomedan law to use force or restraint to compel his wife to live with him in spite of the general English law and the provisions of the Code contained in ss 339 340 and 350 The forcible removal of the wife amounts to an offence and persons who join the husband in doing so are also not protected by this section[2]

2 Mistake of fact — Mistake is not mere forgetfulness[3] It is a slip made not by design but by mischance [4] Mistake as the term is used in jurisprudence is an erroneous mental condition conception or conviction induced by ignorance misapprehension or misunderstanding of the truth and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction but without its erroneous character being intended or known at the time It may concern either the law or the facts involved

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Under s 76 and this section the mistake must be one of fact and not of law At common law an honest and reasona

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general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy the sentinel strikes or shoots him taking him to be an enemy his ignorance of the person excuseth his offence [8] Similarly where a man made a thrust with a sword at a place where upon reasonable grounds he supposed a burglar to be and killed a person who was not a burglar it was held that he had committed no offence[9] In other words he was in the same situation as far as regarded the homicide as if he had killed a burglar

But where an act is clearly a wrong in itself and a person under a mistaken impression as to facts which render it criminal commits the act then according to the *ratio decidendi* in *Prince's* case[10] he will be guilty of a criminal offence

[1] *Kass m Isub Sab* (1919) 14 Bom L R 365

[2] *Ramlo* (1918) 12 S L R 29 *Haji Bala* (1908) 2 S L R 6

[3] Per Esher M R in *Barrow* v *Isaacs* [illegible]

[illegible] 168 181 16 Cox 629

[6] 1 Hale P C 42 43 *Levett* (1839) Cro Car 538

[7] Per Stephen J in *Tolson* sup p 188

[8] 1 Hale P C 42

[9] *Levett* sup

[10] (1875) L R 2 C C R 154 See *Tolson* sup p 180

Cases.—Mistake of fact.—Good defence.—The accused, a police constable, saw the complainant, early one morning, carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen, he went up to the complainant and questioned him. The complainant gave answers that were not satisfactory and refused to allow the constable to inspect the cloth, and a scuffle thereupon ensued between the two. The complainant was arrested by the constable, but was released by the Inspector of Police. The complainant then prosecuted the constable for wrongful restraint and confinement, and the Magistrate convicted the constable of the said offence. The High Court held that the conviction was wrong as the constable acted under a bona fide belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant to clear up his suspicions was an indication of good faith and he was, therefore, protected by this section[1]. A Chowkidar in good faith took the complainant for a thief and captured him. It was held that he was entitled to the benefit of s. 76 and this section. The Court said: "If there was any mistake regarding the fact of complainant's being a thief, it was a mistake of fact, and not a mistake of law"[2]. Where a person believing in good faith that the object of his assault was not a human being but a ghost, caused fatal injuries on another which resulted in the death of the latter, it was held that in view of the provisions of this section, the accused was not guilty of murder or culpable homicide or even of an offence under s. 304-A of the Penal Code[3]. Where certain persons went to execute a warrant of arrest against their judgment-debtor, and a palanquin with closed doors was noticed to be coming out of the male apartments of the house, and they believing that the judgment-debtor was effecting his escape in it, stopped it and examined it, although the person accompanying it protested and said there was a lady in it and there turned out to be in it a *pardanishin* lady of rank, it was held that the accused were protected by this section[4].

Where the act of conveying liquor without a permit was made penal by the Madras Abkari Act[5] and the onus of proving that the act was not an offence was thrown by the Act upon the accused, it was held that the accused had discharged the onus by proving that they believed in good faith that they were not transporting liquor[6].

English cases.—The prisoner was convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. She believed in good faith and on reasonable grounds that her husband was dead. It was held that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong[7]. Where a statute prohibited a licensed victualler from supplying liquor to a police constable on duty, and a victualler did supply liquor to a contable bona fide believing that he was off duty, it was held that he had committed no offence[8].

Bad defence.—A police-officer saw a horse tied up in B's premises, and because it happened to resemble one which his father had lost a short time previously, he jumped at once to the conclusion that B had either stolen the horse himself, or had purchased it from the thief, and compelled B to account for his possession. He found that B had bought the animal from one S ; so he sent for S, charged him with the theft, and compelled him to give bail whilst an investigation was pending. The police-officer never sent for the supposed owner of the horse, or took the

1 *Bhawoo Jivaji* v. *Mulji Dayal*, (1888) 12 Bom. 377. See *Lawrence* v. *Hedger*, (1810) 3 Taunt. 14.

2 Per Campbell, J., in *Protab Chowkeedar*, (1865) 2 W. R. (Cr.) 9.

3 *Waryam Singh*, (1926) 28 Cr. L. J. 39. See *Hayat*, (1887) P. R. No. 11 of 1888, where the accused was convicted under s. 304 A.

4 *Kanai Lal Gowla*, (1897) 24 Cal. 885.

5 Madras Act I of 1886, s. 64.

6 *Kandan*, (1894) 1 Weir 40. See *Waman Dhanraj*, (1908) 10 Bom. L. R. 171.

7 *Tolson*, (1889) 23 Q. B. D. 168.

8 *Sherras* v. *De Rutzen*, [1895] 1 Q. B. 918.

English cases —It is no defence to an indictment for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her father that the accused bona fide and reasonably believed that the girl was older than sixteen[2] One of the grounds for this decision was that notwithstanding such belief the prisoner intended to do and did a wrongful or immoral act and not an innocent act when he took the girl away This case may be thus distinguished from *Tolson s* case in which the conduct of the woman was not in the smallest degree immoral but was on the other hand perfectly natural and legitimate The accused was convicted under a statute of receiving lunatics into her house not being a house duly licensed under the statute but it was found that though the persons so received were lunatics the defendant honestly and on reasonable grounds believed that they were not lunatics It was held that such belief was immaterial and that the conviction was right[3] It is not easy to draw a distinction between *Tolson s* case and this case But the decision in this case

intoxication and without being aware that the person so served was drunk it was

liquor to a child under fourteen in a vessel not corked and sealed it was held that he was liable under the statute although he honestly believed when he delivered the liquor that the vessel was so corked and sealed[5]

3 **Mistake of law** —A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect

of discretion and *compos mentis* from the penalty of the breach of it because every person of the age of discretion and *compos mentis* is bound to know the law and presumed so to do [6]

Some of the decisions profess to see a clear and practical distinction between
e confusion in the
two Ignorance
e does not pretend
to knowledge but mistake assumes to know Ignorance may be the result of laches which is criminal mistake argues diligence which is commendable But whatever merit this distinction may possess in academic discussion it has been rejected by the Courts as being a refinement too subtle for application to practical affairs

If any individual should infringe it (the statute law of the country) through ignorance or carelessness he must abide by the consequence of his error it is

[1] *Sheo Suran Sahai* v *Mahomed Fazil Kha* (1868) 10 W R (Cr) 20
[2] *Prince* (1875) L R 2 C C R 154
[3] *Bishop* (1879) 5 Q B D 259
[4] *Cundy* v *Le Cocq* (1884) 13 Q B D 207
[5] *Brooks* v *Mason* [1902] 2 K. B 743.
[6] 1 Hale P C. 42

not competent to him to aver in a Court of Justice that he was ignorant of the Criminal Law of the land, and that no Court of Justice is at liberty to receive such a plea"[1].

Austin[2] says "that if *ignorance of law* were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the Court, in every case, would be bound to decide the point....Whether the party was *really* ignorant of the law, and was *so* ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution".

Although ignorance of law does not excuse a person, who does an action which is an offence irrespectively of any guilty knowledge on the part of the alleged offender, yet, when to constitute the offence it must be shown that there was a certain knowledge, the offence is not committed by one who acts without that knowledge, and it is immaterial whether the absence of the knowledge required to constitute the offence proceeded from ignorance of law or ignorance of fact. For, though ignorance of law is no ground of defence, it is evidence of mental condition[3].

The maxim *ignorantia juris non excusat*, in its application to criminal offences, admits of no exception, not even in the case of a foreigner who cannot reasonably be supposed in fact to know the law of the land[4]. In a case two Frenchmen were charged with wilful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they were ignorant of the fact that by the law of England killing an adversary in a fair duel amounted to murder. Coleridge, J., said: "We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and ignorant of our law relating to duelling. But I agree with the Lord Chief Justice, that foreigners who come to England, must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner"[5].

Ignorance of a statute newly passed.—Although a person commits an act which is made an offence for the first time by a statute so recently passed as to render it impossible that any notice of the passing of the statute could have reached the place where the offence has been committed, yet his ignorance of the statute will not save him from punishment. In the case in which this principle has been laid down, the accused, a captain of a vessel, was indicted for maliciously shooting a mariner of another vessel. The latter vessel was sailing without colours and was so conducting herself as to give the accused reasonable ground to think that she was an enemy. However, on boarding her, he found that she was an English vessel, but for some reason he and the captain of the vessel quarrelled. The accused left her and when he got on board his own vessel he ordered three guns to be fired, one of which wounded the mariner. It was insisted on behalf of the accused that he had a right to fire upon the vessel, because the captain did not produce her papers; that he did not shoot at the mariner but at the ship; and that the accused could not be found guilty of the offence with which he was charged, because the statute 39 Geo. III., c. 37, upon which the accused was indicted, came into force on the 10th May, 1799, and the fact charged in the indictment happened

1 Per Collins, C. J., in *Fischer*, (1891) 14 Mad. 342, 354.

2 Jurisprudence, (4th Edn.), Vol. I, pp. 498, 499.

3 (1881) 1 Weir 74, 75.

4 *Esop*, (1836) 7 C. & P. 456.

5 *Baronet* and *Allain*, (1852) Dearsly 51, 59.

on the 27th June following, when the accused could not know that any such statute existed The jury said that they were satisfied that the accused did not fire upon the vessel for non production of her papers, but in consequence of the quarrel which had taken place between him and the captain of the other vessel Lord Eldon was of opinion that the guns might be considered as shot at each individual on board her, that the accused was, in strict law, guilty within [illegible] not then know that it had passed, [illegible] rwise affect the case than that it might be the means [illegible] merciful consideration On a reference to twelve other judges it was held that the accused could not have been tried if the statute 39 Geo III, c 37, had not passed, and as he could not have known of that statute, they thought it right he should have a pardon[1] An act, [illegible] becomes lawful when a statute makes [illegible] doer of the act that any such statute is [illegible] or proceeding not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so a reasonable time must be allowed for its discontinuance, and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless [illegible] when it becomes necessary to consider the circumstances [illegible] and when [illegible] onable time

[illegible] was caught [illegible] of the lord of the manor A [illegible] It was found that A had acted under a bona fide impression that the [illegible] wires were his property It was held that he had committed no offence[4] Where an ignorant person found a five pound note and appropriated it, not knowing that he was bound by law to endeavour to discover the true owner thereof before converting it to his own use, the Court directed the jury to consider the state of the finder's mind, and ruled, that if the jury thought the person really believed the note to be his own by right of finding the jury should not bring in a verdict of guilty Coleridge, J, said "Ignorance of the law cannot excuse any person, but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind, as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony"[5]

Mistake of fact a [illegible] —In civil causes, it seems that if law and fact are blended as a [illegible] by ignorance of law, the [illegible] may take advantage[6]

'Good faith'.—See s 52, *supra* To satisfy the Court of his good faith, [illegible] and that he had reasonable [illegible] at he did[7]

Good [illegible] it due care and attention But how far erroneous actions or statements are [illegible] mputed to want of due care and caution, must in each case be considered with reference to the general [illegible] intelligence of the person whose conduct is in [illegible] h is always a question of fact to be determined and circumstances of each case

1 *Bailey's case* (1800) R & R 1
2 *Burns* v *Nowell* (1880) 5 Q. B D 444, 454
3 *Ibid*
4 *Hall*, (1828) 3 C & P 409
5 *John Reed*, (1842) C & M 306 308.
6 Bishop's Criminal Law, (6th Edn), s 311
7 1st Rep, s 114, p 219
8 *Abdool Wadood*, (1907) 31 Bom 293, 17 Bom L R. 230

Act of state.—Stephen[1] says: "I understand by an act of State an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty....

"When an act of this sort is an act of open war, duly proclaimed, there can be no doubt at all that it does not amount to a crime. However unjust a war might be, and however cruelly it might be carried on, there can be no question that the acts done in such a war by the orders of military and naval commanders do not fall under the notice of the ordinary criminal law...If England were invaded, and if, for military reasons, unarmed prisoners, after resistance had ceased were to be put to death by an English general, I do not think that a court of law would inquire whether his conduct was proper or not. As soon as it appeared that what was done was an act of war the matter would be at an end...

"The difficulty arises when acts which are in their nature warlike are done in time of peace...

"I think that if such acts are done by public authority, or, having been done, are ratified by public authority, they fall outside the sphere of the criminal law...

"I do not know that the principle has ever been tested by a criminal prosecution, but it has been repeatedly affirmed in civil cases; and if a man is not even liable civilly for an act of State, it would seem to follow *a fortiori* that he cannot be liable criminally...

"In order to avoid misconception it is necessary to observe that the doctrine as to acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned".

The test whether an act is or is not an act of State excluding the jurisdiction of the Courts, is not whether it is capable of being legally performed only by persons specially empowered in that behalf as authorised by the law to perform specific acts of Government, but whether it is an act of State in those external relations, which municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all and which could neither assert nor violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and interstatal duties and rights[2]; for instance, a seizure of

[1] History of the Criminal Law of England, Vol. II, pp. 61-65. See *Rajah of Coorg* v. *The East India Company*, (1860) 29 Beav. 300; *Doss* v. *The Secretary of State for India*, (1875) L. R. 19 Eq. 509; *The Secretary of State* v. *Kamachee Boye Sahaba*, (1859) 7 M. I. A. 476; *Raja Saligram* v. *The Secretary of State for India*, (1872) 12 Beng. L. R. 167, P.C.; *Sirdar Bhagwan Singh* v. *The Secretary of State for India*, (1874) 2 I. A. 38. See also an exhaustive note on this subject by Sir H. S. Gour, in the Bombay Law Reporter, Journal, Vol. VIII, pp. 69-76 and 97-110, where the writer subjects Sir Fitz James Stephen's theory to a close criticism.

[2] *Jehangir* v. *Secretary of State*, (1903) 6 Bom. L. R. 131. 148.

territory by the British Government as a sovereign power[1], or an act done by an agent of Government in his political capacity[2], or an order of the Governor General in Council deposing the ruler of a Native State[3]

The acts of State of which municipal Courts in India are debarred from

by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of civil Courts[4] The legality of the sovereign's acts towards his own subjects can be questioned in civil Courts[5] A British Court may enquire into the character of the act of the Governor of a foreign State, and is not bound to accept it as an act of State[6]

Persons carrying out an act of State under proper order will be protected by the Penal Code, in the same way as if they were carrying out a lawful order under the municipal law

To support a plea of this nature two things are essential —(1) that the defendant had authority to act on behalf of the Crown in the matter, and (2) that in so acting he was professing to act as a matter of policy, outside the law, and not as a matter of right within the law

Martial law —"The proclamation of martial law is in fact, no more than a declaration, that under circumstances of urgent public danger, *all law is for a time suspended*, and that for the safety of the State the Government deems it necessary to *set aside the ordinary rules of law* by a military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it Courts martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions, by instituting an inquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion But courts martial so assembled have nothing in common with the tribunals bearing the same name, which, under the Mutiny Act, take cognizance of military offences, &c Courts martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with courts martial assembled for the punishment of rebels, under pro-

inquiry into the guilt of those who were subjected to them Accordingly, it is the practice, when martial law has been exercised and punishments have been inflicted under it that where the danger is over, the legislature should be applied to for laws of indemnity for the security of those by whom these powers have been exercised, and for whom *there is no legal warrant*, however necessary it may have been to assume them"[7]

The civil Courts have no jurisdiction *durante bello* to interfere with the decision of a military court sitting in a martial law area, even where a capital sentence has been pronounced, and is about to be executed, for an offence not punishable

[1] *The Secretary of State v Kamachee Boye Sahaba* (1859) 7 M I A 476

1, 6 Bom L R 763

[4] *The Secretary of State for India v Hari Bhanji*, (1882) 5 Mad 273

[5] *In re Ameer Khan* (1870) 6 Beng L R 392

[6] *The Bombay Burma Trading Corporation, Limited v Mirza Mahomed Ali Sheragee*, (1873) 10 Beng L R 345

[7] Finlayson's Review ... the Repression of R... t

capitally under the ordinary criminal law[1]. The High Court in Ireland has held that it has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law; but once such a condition of affairs is established to the satisfaction of the Court, it cannot interfere to determine what is or what is not necessary[2].

Liability of private persons.—Private persons acting under ss. 43, 59, 77 and 78 of the Code of Criminal Procedure[3] will be protected under this section.

If an offender resists arrest and attempts to escape, a person who is bound by law to assist in arresting the offender and in preventing his escape is entitled to use all means necessary to effect the arrest short of causing death[4].

PRACTICE.

Procedure.—**Jurisdiction.**—*Act of State.*—It is within the province of municipal Courts to determine the true character of the acts done by a public functionary, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it[5].

Punishment.—Ignorance of law is no defence, but it is a matter to be taken into consideration in mitigation of punishment[6].

Accident in doing a lawful act.

80. Nothing is an offence which is done by accident[1] or misfortune, and without any criminal intention[2] or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

ILLUSTRATION.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

COMMENT.

This section exempts the doer of an innocent or lawful act in an innocent or lawful manner from any unforeseen evil result that may ensue from accident or misfortune. If either of these two elements is wanting the act will not be excused on the ground of accident.

1. 'Accident'.—An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things[7]. An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it[8]. The idea of something fortuitous and unexpected is involved in the word 'accident'[9]. An injury is said to be accidentally caused whensoever it is neither wilfully nor negligently caused[10]. Accused was beating a person with his fists when the latter's wife with a baby on her shoulder interfered. Accused hit at the woman but the blow incidentally struck

1 *John Allen*, [1921] 2 I. R. 241.
2 *Strickland*, [1921] 2 I. R. 317.
3 Act V of 1898.
4 *Mani Kharki*, (1926) 28 Cr. L. J. 445.
5 *Musgrave* v. *Pulido*, (1879) 5 App. Cas. 102, 111.
6 *Esop*, (1836) 7 C. & P. 456; *Sitaram Kunbi*, (1928) 29 Cr. L. J. 506.
7 Per Willes, J., in *Fenwick* v. *Schmalz*, (1868) L. R. 3 C. P. 313, 316.
8 Stephen's Digest of Crim. L., Art. 231.
9 Per Lord Halsbury in *Hamilton, Fraser & Co.* v. *Pendorf & Co.*, (1887) 12 App. Cas. 518, 524.
10 10th Par. Rep. 16.

the baby and two days later it died from the effects of the blow It was held that although the child was hit by accident the accused s act was not covered by this section

[2] further

elucida

(1) A a schoolmaster corrects a scholar in a manner not intended or likely to injure him using due care The scholar dies Such a death is accidental

(2) A turns B a trespasser out of his house using no more force than is necessary for that purpose B resists but without striking A They fall in the struggle and B is killed Such a death is accidental

(3) A a workman throws snow from a roof giving proper warning A passenger is nevertheless killed Such a death is accidental

(4 [illegible] it is loaded or not points it in [illegible] Such a death is not accidental [illegible] not loaded the death would have been accidental although he had not used every possible precaution to ascertain whether the gun was loaded or not

2 **'Criminal intention'** —See Comment under s 81 *infra*

CASES.

Shooting accident —Two men accused and deceased went into a jungle, shikaring porcupines They agreed to take up certain positions in the jungle and lie in wait for game This was done After a while the accused heard a rustle and believing it was a porcupine fired in that direction The shot however reached his companion and caused his death It was held that the accused was protected by this section the affair being a pure accident[3] The accused a young man with several companions went to shoot a pig He took up his position and waited in the jungle while his companions proceeded to beat the pig towards him A boar was driven in his direction and the accused fired The ball however missed the boar and hit one of the beaters causing his immediate death It was held that the death was the result of an accident and was not due to any such negligence on the part of the accused as would bring his act within the purview of s 304 A of the Penal Code and the accused was not guilty of any offence[4]

English cases —A man found a pistol in the street which he had reason to believe was not loaded having tried it with a rammer he carried it home and shewed it to his wife and she standing before him he pulled up the cock, and touched the trigger The pistol went off and killed the woman The rammer, perhaps was too short and deceived him It was held that the man was guilty of manslaughter Foster thinks that this is an extremely hard case because accidents of this lamentable kind may be the lot of the wisest and the best of mankind and most commonly fall amongst the nearest friends and relations'[5] A man and his wife went to take a dinner at the house of a friend He carried his gun with him hoping to meet with some diversion by the way but before he [illegible]

it part of the way He taking it up touched the trigger, and the gun went off and killed the wife whom he dearly loved It came out in evidence that while the man was at Church a person belonging to the family had privately taken the gun out to shoot and had returned it loaded to the place where it was [illegible]

[1] *Jageshar* (1923) 24 Cr L J [illegible]89 See *Chatur Natha* (1919) 21 Bom L R 1101 5 Bom Cr C 1[illegible]
[2] Article 231 p 168
[3] *Timmappa* (1901) 2 [illegible]
[4] *Basant Singh*
[5] *Rampton s case*,

friend's house. The accused was acquitted on the ground that he had reasonable grounds to believe that the gun was not loaded[1]. A person was charged with having fired a fowling-piece loaded with small shot, in a field within an easy shot of a high road, where persons frequently passed, and in the direction of the road, and killed a girl passing at the time. It appeared that the shot was really a long one, being above fifty yards, and that it proved fatal only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly penetrated the skin. It was held that the death was accidental[2].

Act likely to cause harm, but done without criminal intent, and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention[1] to cause harm, and in good faith[2] for the purpose of preventing or avoiding other harm to person or property[3].

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

ILLUSTRATIONS.

(*a*) A, the captain of a steam-vessel, suddenly and without any fault of negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

(*b*) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

COMMENT.

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided[3].

Wherever necessity forces a man to do an illegal act, *forces* him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be voluntary. A man who is absolutely by natural necessity forced, his will does not go along with the act[4].

1 Foster, 265.
2 Alison, 144.
3 Stephen's Digest of Crim. L., Art. 33.
4 Per Lord Mansfield in *George Stratton*, (1779) 21 St. Tr. 1046, 1223.

1. 'Without any criminal intention'.—Under no circumstances can a person be justified in intentionally causing harm, if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property

'Criminal intention' simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse An act is intentional if it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied The motive for an act is not a sufficient test to determine its criminal character By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action Motive may serve as a clue to the intention, but although the motive be pure, the act done under it may be criminal Purity of motive will not purge an act of its criminal character

Motive though not a *sine qua non* for bringing the offence home to the accused is relevant and important on the question of intention[1] Though the prosecution is not bound to prove motive for the crime, absence of any motive is a factor which may be considered in determining the guilt of the accused[2] But if the actual evidence as to the commission of the crime is believed, then no question of motive remains to be established[3]

An accused must be judged to have the intention that is indicated by his proved acts[4]

Under the Penal Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception may appear to be"[5]

Mens rea—It is one of the principles of the English criminal law that a crime is not committed if the mind of the person doing the act in question be innocent It is said that *actus non facit reum, nisi mens sit rea* (the intent and act must both concur to constitute the crime) This principle was discussed elaborately by Wills, J, in *Tolson's* case[6] in which the accused was convicted of bigamy, having gone through the ceremony of marriage within seven years, after she had been deserted by her husband The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead It was held by the majority of the Court that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong 'The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong That intention may belong to one or other of two classes It m [illegible] to do a [illegible] of in te [illegible] things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong, and the intention to do an act wrong in [illegible] con [illegible] hink, [illegible] ecial [illegible] the [illegible] out

1 *Hazrat Gul Khan*, (1927) 47 C. L J 240 32 C. W N 345, *Chandu*, (1928) 29 Cr L. J 378

2 *Hans Raj* (1928) 30 Cr L. J 478

3 *Ka[illegible] B[illegible]lar* (1928) 48 C [illegible] J 309, *Tilak Ram*, (1928) 5 O W N 596.

4 *Parbhu Dusadh*, (1926) 23 Cr L. J 8[illegible]

5 Per Stuart, C J, in *Abdul Ka[illegible]*, ([illegible] 3 All 279 280 F B

6 (1889) 23 Q B D 1[illegible]

But *Sherras* v *De Rutzen*[1] seems very like an emphatic re assertion of the doctrine that *mens rea* is an essential ingredient in every offence except in three cases[2] (1) cases not criminal in any real sense but which in the public interest are prohibited under a penalty e g Revenue Acts, (2) public nuisances and (3) cases criminal in form but which are really only a summary mode of enforcing a civil right

An intention to offend against the penal provisions of an Act constitutes *mens rea* Sir Richard Couch in delivering judgment of the Judicial Committee of the Privy Council[3] observed It was strongly urged by the respondent's counsel that in order to the constitution of a crime whether common law or statutory there must be mens rea on the part of the accused and that he may avoid conviction by shewing that such mens did not exist That is a proposition which their Lordships do not desire to dispute but the questions whether a particular intent is made an element of the statutory crime and when that is not the case whether there was an absence of mens rea in the accused are questions entirely different and depend upon different considerations In cases when the statute requires a motive to be proved as an essential element of the crime the prosecution must fail if it is not proved On the other hand the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which if true would make the act charged against him innocent

The maxim *actus non facit reum nisi mens sit rea* has however no application to the offences under the Code because the definitions of various offence contain expressly a proposition as to the state of mind of the accused The definitions state whether the act must have been done voluntarily knowingly dishonestly or fraudulently or the like Every ingredient of the offence is stated in the definitions So *mens rea* will mean one thing or another according to the particular offence The guilty mind may thus be a fraudulent mind or a dishonest mind or a negligent or rash mind

In a criminal Court one often wants to test the alleged guilty mind b[illegible] criminal in doing the particular act It [illegible] secution to establish a motive But a [illegible] importance because an average man [illegible] less he has a strong motive for doing it[4]

When guilty intent is of the gist of an offence evidence of similar acts to those charged at or about the same time as the latter is admissible to prove the intent[5]

2. **'Good faith'** —See s 52 *supra*

3. **'Preventing harm to person or property'** —This is the ca[illegible]

[illegible] The welfare of the State has served as a pretext for all crimes To give validity to this means of justification three essential points must be established the certainty of the will to be avoided the absolute inapplicability of any means less costly, the certain efficacy of the means employed[6].

1 [1895] 1 Q B 918

2 *Vide* the judgment of Wright J in *ibid*

3 *Bank of New South Wales* v *Piper* [189] A C 383 389

4 Per Marten C J in *Shandasani* (19[illegible]) Criminal Revision No 387 of 1927, decided on April 5 19[illegible]9

5 *Dudley* West (1916) [illegible]

6 Ben[illegible]

Where a chief constable, not in his uniform, came to a fire and wished to force his way past the military sentries placed round it, was kicked by a sentry, it was held that, as the sentry did not know who he was, the kick was justifiable *for the purpose of preventing much greater harm under this section and as a means* of acting up to the military order. "The kick would be justified under s. 81...as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading[1]." Where a Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that the Magistrate was protected under this section or ss. 96 to 105[2]. A person placed poison in his toddy pots, knowing that, if taken by a human being, it would cause injury, but with the intention of thereby detecting an unknown thief who was in the habit of stealing the toddy from his pots. The toddy was drunk by, and caused injury to, some soldiers who purchased it from an unknown vendor. It was held that the person was rightly convicted under s. 328, and that this section did not apply[3].

English cases.—A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D and S, seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean and was probably more than 1,000 miles from land: that on the eighteenth day, when they had been seven days without food and five without water, D proposed to S that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D, with the assent of S, killed the boy, and both D and S fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation. It was held, upon those facts, that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder[4]. Lord Coleridge, C. J., said; "The temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequences; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead;* these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. 'Necesse est ut eam, non ut vivam,' is a saying of a Roman

1 Per Jardine, J., in *Bostan valad Futtekhan,* (1892) 17 Bom. 626, 628.

2 *Gopal Naidu,* (1922) 46 Mad. 605, F.B.

3 *Dhania Daji,* (1868) 5 B. H. C. (Cr. C.) 59.

4 *Dudley and Stephens,* (1884) 14 Q. B. D. 273, pp. 287, 288.

officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made It is not needful to point out the awful danger of admitting the principle which has been contended for

[illegible]

necessity which will justify him in deliberately taking another's life to save his own In this case the weakest, the youngest, the most unresisting, was chosen Was it more necessary to kill him than one of the grown men? The answer must be 'No'—

'So spake the Fiend, and with necessity,
The tyrant's plea excused his devilish deeds

It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not

[illegible] an excuse, [illegible] the criminal

[illegible] a plank not [illegible] This, in the opinion of Sir James Stephen is not a crime, as A thereby does B no direct bodily harm, but leaves him to his chance of another plank

Doctrine of self-preservation—The authors of the Code remark — 'We long considered whether it would be advisable to except from the operation of the penal clauses of the Code acts committed in good faith from the desire of

[illegible]

and for this reason, that, as the Penal Code itself appeals solely to the fears of men, it never can furnish them with motives from braving dangers greater than the dangers with which it threatens them Its utmost severity will be inefficacious for the purpose of preventing the mass of mankind from yielding to a certain amount of temptation It can, indeed, make those who have yielded to the

[illegible]

but it is not to our virtue that the penal law addresses itself, nor would the world stand in need of penal laws if men were virtuous A man who refuses to commit

[illegible] for the purpose o[illegible]

[illegible] man for voluntar[illegible] causing the death of others by jumping from a sinking ship into an overloade[illegible] boat The suffering caused by the punishment is considered by itself an e[illegible] and ought to be inflicted only for the sake of some preponderating good [illegible] no preponderating good, indeed no good whatever, would be [illegible] a man for such an act We cannot expect that the next man [illegible]

in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which if they were general, would render penal law unnecessary. Again, a gang of dacoits, finding a house strongly secured, seize a smith, and by torture and threats of death induce him to take his tools and to force the door for them; here, it appears to us, that to punish the smith as a housebreaker would be to inflict gratuitous pain; we cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted and sentenced to imprisonment, than incur certain and immediate death.

"In the cases which we have put, some persons may perhaps doubt whether there ought to be impunity; but those very persons would generally admit that the extreme danger was a mitigating circumstance to be considered in apportioning the punishment. It might, however, with no small plausibility be contended that if any punishment at all is inflicted in such cases, that punishment ought to be not merely death, but death with torture; for the dread of being put to death by torture might possibly be sufficient to prevent a man from saving his own life by a crime; but it is quite certain, as we have said, that the mere fear of capital punishment which is remote, and which may never be inflicted at all, will never prevent him from saving his life. And *a fortiori*, the dread of a milder punishment will not prevent him from saving his life. Laws directed against offences to which men are prompted by cupidity, ought always to take from offenders more than those offenders expect to gain by crime. It would obviously be absurd to provide that a thief or a swindler should be punished with a fine not exceeding half the sum which he had acquired by theft or swindling; in the same manner, laws directed against offences to which men are prompted by fear ought always to be framed in such a way as to be more terrible than the dangers which they require men to brave. It is on this ground, we apprehend, that a soldier who runs away in action is punished with a rigour altogether unproportioned to the moral depravity which his offence indicates. Such a soldier may be an honest and benevolent man, and irreproachable in all the relations of civil life; yet he is punished as severely as a deliberate assassin, and more severely than a robber or a kidnapper. Why is this? Evidently because, as his offence arises from fear, it must be punished in such a manner that timid men may dread the punishment more than they dread the fire of the enemy.

"If all cases in which acts, falling under the definition of offences are done from the desire of self-preservation were as clear as the cases which we have put of the man who jumps from a sinking ship into a boat, and of the smith who is compelled by dacoits to force a door for them, we should, without hesitation, propose to exempt this class of acts from punishment. But it is to be observed, that in both these cases the person in danger is supposed to have been brought into danger, without the smallest fault on his own part, by mere accident, or by the depravity of others. If a captain of a merchantman were to run his ship on shore in order to cheat the insurers, and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy; if a person who had joined himself to a gang of dacoits with no other intention than that of robbing were, at the command of his leader, accompanied with threats of instant death in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply; for it is evident that punishment which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear which a man may entertain of being

brought to the gallows at some distant time as sufficient to overcome the fear of instant death, but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life Nothing is more usual than for pirates, gang robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise Nor is it by any means improbable that this may often

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'Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft and than the disgrace which that punishment brings with it to the mass of mankind It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences ... ollows that it is irrat ... ment is not likely t ... very

'We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence

"There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death But it appears to us impossible precisely to define these cases We have, therefore, left them to the Government, which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts"[1]

But in their First Report the Commissioners say "We think that a dis*tinction may be drawn between cases in which a man does a thing which is an* offence by law, spontaneously, to save his own life, and cases in which he does such a thing, from what is called duress, that is from the compulsion of others to save his life threatened by them

"With respect to the former, we agree with the authors of the Code that it is impossible to define precisely those cases in which it may be proper to excuse the parties and that it is expedient to leave them to the discretion of the Government"[2] They then proposed s 64 to meet the latter kind of cases

As to the doctrine of compulsion and necessity, see Comment under s 94, *infra*

Act of a child under seven years of age

82 Nothing is an offence which is done by a child under seven years of age.

[1] Note B, p 111, 112, 113

[2] Sections 167, 168

COMMENT.

Under the age of seven years no infant can be guilty of a crime; for, under that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion[1]. He cannot distinguish right from wrong. If the accused were a child under seven years of age, the proof of that fact would be *ipso facto* an answer to the prosecution[2]. Accused purchased for one anna, from a child aged six years, two pieces of cloth valued at fifteen annas, which the child had taken from the house of a third person. It was held that, assuming that a charge of an offence under s. 411 could not be sustained, the accused was clearly guilty of criminal misappropriation, if he knew that the property belonged to the child's guardian and dishonestly appropriated it to his own use[3]. The defendant caught a child in the act of stealing a piece of wood from his premises, and gave him into custody. The child was discharged by the Magistrate on the ground that it was under the age of responsibility. Erle, C. J., said that an infant under seven years of age could not incur the guilt of felony[4].

The exception in favour of infants under seven years is only confined to the Penal Code, and does not extend to local or special Acts. See, for instance, the Indian Railways Act[5] as to the offences committed by children against certain provisions of that Act. See also *ante* s. 6, ill. (*a*).

Act of a child above seven and under twelve of immature understanding.

83. Nothing is an offence which is done by a child above seven years of age and under twelve[1], who has not attained sufficient maturity of understanding[2] to judge of the nature and consequences of his conduct[3] on that occasion.

COMMENT.

In construing this section the capacity of doing that which is wrong is not so much to be measured by years, as by the strength of the offender's understanding and judgment. The circumstances of a case may disclose such a degree of malice as to justify the maxim *malitia supplet ætatum*[6].

1. **'Under twelve'.**—With reference to the precocity of children in the East, the rule of the Indian Code which fixes the age of twelve as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper[7].

2. **'Sufficient maturity of understanding'.**—"Where the accused is above seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained sufficient maturity, etc., and such non-attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind. The Legislature is manifestly referring in Section 83...to an exceptional immaturity of intellect"[8]. Maturity of understanding is to be presumed in the case of such a child unless the negative be proved on the defence[9].

3. **'Consequences of his conduct'.**—"It is not apparently the *penal* consequences to the offender that are referred to, but the natural consequences which flow from a voluntary act, such for instance as that, when fire is applied to

1 1 Hale P. C. 27, 28; *Marsh* v. *Loader*, (1863) 14 C. B. N. S. 535.
2 *Lukhini Agradanini*, (1874) 22 W. R. (Cr.) 27.
3 *Makhulshah*, (1886) 1 Weir 470.
4 *Marsh* v. *Loader*, supra.
5 Act IX of 1890, s. 130.
6 *Mussamut Aimona*, (1864) 1 W. R. (Cr.) 43.
7 1st Rep., s. 117.
8 Per Jackson, J., in *Lukhini Agradanini*, (1874) 22 W. R. (Cr.) 27, 28.
9 1st Rep., s. 117.

an inflammable substance it will burn or that a heavy blow with an axe or a sword will cause death or grievous hurt [1]

Theft by a child —Where a child of nine years of age stole a necklace worth Rs 2 8 and immediately afterwards sold it to the accused for five annas the [illegible]

of his conduct and that the act of the child was therefore theft and that the accused was rightly convicted of receiving stolen property[2]

Bigamy by a child of ten years —Where a child of ten years married again during the life time of her husband the marriage being negotiated and caused to be performed by her mother the child was held not to have attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage[3]

Murder by a girl of ten years —The accused who was about ten years of age slept with her mother in law the night before the murder Her husband aged about nineteen slept with his brother in another hut in the same homestead In the early morning the mother in law woke up the accused and told her to go about her household duties Shortly after this the accused was seen running out of the house and her husband was found mortally wounded on the neck She hid herself in a field and was not found until the afternoon It was held that she was *doli capax* and that the Court could infer from the circumstances of the case such a degree of malice as to justify the application of the maxim *malitia supplet ætatum*[4]

English law —According to English law an infant between the age of seven and fourteen years is presumed to be *doli incapax* If a child more than seven and under fourteen years of age is indicted for felony it will be left to the jury to say whether the offence was committed by the accused and if so whether at the time of the offence the accused had a guilty knowledge that he was doing wrong[5] In cases of murder if it appear to the Court and jury that the infant was *doli capax* and could discern between good and evil when the offence was committed he may be convicted of the capital offence and executed[6] But an infant under fourteen if indicted for murder must be proved conscious of the nature of the act[7]

Infants above fourteen and under twenty one are subject to all kinds of punishments for it is *presumptio juris* that after fourteen years they are *doli* [illegible]

29 for burning two barns
cunning[9] Where a boy
away was held sufficient
rl of thirteen
of age killed
l afterwards
pardon was
asked for Similarly where a boy of ten years of age murdered a girl of about five years of age under circumstances of mischievous discretion he was sentenced to death though he was afterwards pardoned by the King upon condition of his

1 Per Jackson J n *Lukh ni Agradanini* (1874) 2? W R (Cr) ?7 28
2 *Krishna* (1883) 6 Mad 373
3 *God* (1896) Cr R. No 5? of 1896 Unrep Cr C 876
4 *Mussamut A mona* (1864) 1 W R. (Cr) 43
5 *Elizabeth Owen* (1830) 4 C & P 236
Sidney Smith (1845) 1 Cox 260.
6 1 Hale P C. 26.
7 *Vamplew* (186?) 3 F & F 5?0
8 1 Hale P C. 26.
9 *Ibid* p ?5.
10 *Ibid*, p ?6.
11 *Ibid* p 27

entering immediately into the sea-service. The judges unanimously laid down: "There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing this boy, *merely on account of his age*, will probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remaineth any doubt touching his guilt"[1]. A confession made by a boy under fourteen years of age, who had committed murder, was held to be admissible against him[2].

Rape.—The rule at common law is that in regard to the offence of rape *malitia non supplet ætatum*; a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence to shew that a particular accused was in fact capable of committing the offence. The Criminal Law Amendment Act[3] has not altered the common law principle[4]. Nor can a boy under fourteen be convicted of an assault with intent to commit rape[5], or of feloniously carnally knowing and abusing a girl under ten years of age[6]. But he can be guilty as a principal in the second degree[7] or may be convicted of an indecent assault[8]. This presumption of English law has no application to India[9]. A boy of twelve can be convicted of attempt to commit rape[10].

PRACTICE.

Evidence.—It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention. Where the age of the accused is under twelve years, the Magistrate should, considering the provisions of this section, find that he has attained sufficient maturity of understanding to judge of the nature and consequences of his act[11].

An objection that the accused is of such an age as not to have attained sufficient maturity of understanding to judge of the nature and consequences of his conduct is not one of a preliminary character, but rather a matter of defence to be considered with the other issues arising in the case[12].

Where a child under twelve years of age commits an offence when he is unable to understand the nature of the offence, he cannot be debarred under s. 105 of the Indian Evidence Act from the defence allowed him by this section because of his ignorance of Court procedure[13].

Punishment.—Sentences of death, transportation, or imprisonment cannot be passed on a child or young person under the Bombay Children Act[14], s. 22. The parent may be ordered to pay fine instead of the child or young person under s. 25 of the Act.

1 *William York*, (1748) Foster 70, 72.
2 *William Wild*, (1835) 1 Moody 452.
3 48 & 49 Vic., c. 69.
4 *Waite*, [1892] 2 Q. B. 600.
5 *Eldershaw*, (1828) 3 C. & P. 396; *Henry Philips*, (1839) 8 C. & P. 736.
6 *Jordan*, (1839) 9 C. & P. 118.
7 *Eldershaw*, sup.
8 *Williams*, [1893] 1 Q. B. 320.
9 *Paras Ram Dube*, (1915) 37 All. 187.
10 *Nga Tun Kaing*, (1917) 11 B. L. T. 135.
11 *Makimuddin*, (1899) 27 Cal. 133; *In re Marimuthu*, (1909) 5 M. L. T. 296.
12 *Lukhini Agradanini*, (1874) 22 W. R. (Cr.) 27.
13 *Ali Raza*, (1924) 28 O. C. 69.
14 Bom. Act XIII of 1924.

84 Nothing is an offence which is done by a person who, at the time of doing it[1], by reason of unsoundness of mind[2], is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law[3].

Act of a person of unsound mind

COMMENT.

The policy of the law is to control not only the sane, but so far as is possible, also the insane It is not, therefore, every person mentally diseased who, *ipso facto*, is exempted from criminal responsibility Such exemption is allowed only where the insane person "is incapable of knowing the nature of the act, or that [illegible] the this be laid down in the answers of the Judges to the questions put to them by the House of Lords in *M'Naghten's* case[2]

A man who by reason of mental disease is prevented from controlling his own conduct, and a man who is deprived by disease affecting the mind, of the power of passing a rational judgment on the moral character of the act he meant to do, is entitled to the benefit of this section[3] A human creature deprived of reason, and disordered in his senses, is still an animal, or instrument possessing strength and ability to commit violence, but he is no more so than a mere mechanical machine which, when put in motion, performs its powerful operations on all that comes in its way, without consciousness of its own effects or responsibility for them In like manner, the man under the influence of real madness has properly no will, but does what he is not conscious or sensible of doing and therefore cannot be made answerable for any consequences[4]

There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind) (1) an idiot, (2) one made *non compos* by illness, (3) a lunatic or madman, and (4) one that is drunk

(1) An idiot is one who is of non sane memory from his birth, by a perpetual infirmity, without lucid intervals, and those are said to be idiots who cannot count twenty, or tell the days of the week, who do not know their fathers or mothers, or the like [illegible] discriminate [illegible] of the law, as [illegible] that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted, and punished, although great caution should be observed in such proceedings[5].

(2) A person made *non compos mentis* by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder[6] Several causes have been assigned for this disorder, sometimes from the distemper of the humours of the body, sometimes from the violence of a disease, as a fever or palsy, sometimes from a concussion or hurt of the brain, and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a total alienation of the mind, or complete madness[7].

1 *Lakshman Dagdu*, (1886) 10 Bom. 512, *Nga Kan Hla* (1914) 2 U B. R 28
2 (1843) 4 St Tr (N S) 847, 10 C. & F. 200
3 *Hakil Shah*, (1887) P R No 42 of 1887
4 *Kinlock's* case, (1795) 25 How St Tr, 1000
5 Archbold, 27th Ed., pp 13, 14, Russell, 8th Ed., Vol. I, p 62, 1 Hale P C. 34
6 1 Hale P C. 30.
7 1 Hale P C. 30

(3) A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes; having intervals of reason. Such persons during their frenzy are criminally as irresponsible as those whose disorder is fixed and permanent[1].

That in the species of madness called lunacy, where persons are subject to temporary paroxysms in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be to all intents and purposes amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement[2].

Madness is permanent. Lunacy and madness are spoken of as acquired insanity, an idiocy as natural insanity.

(4) As to persons who are drunk, see s. 85, *infra*.

1. 'At the time of doing it'.—To establish a defence on the ground of insanity it must clearly be proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the *nature and quality* of the act he was doing or, if he did know it, that he did not know he was doing what was wrong[3]. If he did know it, he was responsible[4]. The mere fact that on former occasions the accused had been occasionally subject to insane delusions or had suffered from derangement of the mind, or that subsequently he had at times behaved like a mentally deficient person is *per se* insufficient to bring his case within the exemption[5]. The antecedent and subsequent conduct of the man are relevant only to show what was the state of his mind at the time the act was committed. The Court is only concerned with the state of mind of the accused at the time of the act[6]. A plea of insanity at the time of trial will not avail the accused[7]. In such a case he will be tried in accordance with the special procedure laid down in the Code of Criminal Procedure.

2. 'Unsoundness of mind'.—Whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease, or exists from the time of birth, it is included in this expression. Thus an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and a person who is mad or delirious, are all persons of "unsound mind". There are numerous degrees of insanity. It has been said that not every little cloud floating over an otherwise enlightened understanding will exempt from criminal responsibility; nor, on the other hand, will every glimmering of reason over the darkness of a troubled mind subject the unfortunate being to the heavy pains provided for wilful wrong-doing. According to the Code, unsoundness of mind, to make a man irresponsible, must reach that degree which is described in the latter part of this exception.

If a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor[8].

1 Russell, 8th Edn., Vol. I, p. 63; 1 Hale P. C. 31.

2 *Bellingham's* case, Collison on Lunacy, p. 636; *Edward Oxford*, (1840) 9 C. & P. 525; 533; *Offord*, (1831) 5 C. & P. 168; *Hadfield's* case, Collinson on Lunacy, p. 480.

3 Third question and answer in *M'Naghten's* case, (1843) 10 C. & F. 200, 204; *Edward Oxford*, sup.; *Pursoram Doss*, (1867) 7 W. R. (Cr.) 42; *Jugo Mohun Malo*, (1875) 24 W. R. (Cr.) 5; *Kazi Bazlur*, (1928) 33 C. W. N. 136, 48 C. L. J. 307.

4 *Harka*, (1906) 8 Lah. 684, 690.

5 *Tola Ram*, (1927) 8 Lah. 684, 690.

6 *John Dowlat Moon*, (1927) 29 Cr. L. J. 393.

7 *Nota Ram*, (1866) P. R. No. 56 of 1866.

8 *Harka*, (1906) 26 A. W. N. 193; *Vithoo*, (1911) 7 N. L. R. 185. 13 Cr. L. J. 164.

An idiot or lunatic, even if he is conscious of his act, has no capacity to know its nature and quality, and is therefore not responsible Mad men, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing 'what is either wrong or contrary to law', they are not responsible A common instance is, where a man fully believes that the act he is doing, e g, killing another man, is done by the immediate command of God[1]

'It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of
such as would make the offender incapab
that he is doing what is wrong or contrar
and in consequence of an insane delusion thinks he is breaking a jar Here he does not know the nature of the act Or he may kill a child under an insane delusion

that was going to take his life in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land[2] A person whose cognitive faculties are not so impaired as to make it impossible for him to know the nature of his act or that he was doing what was wrong or contrary to law is not exempted from criminal responsibility[3]

It is not every kind of frantic humour or something unaccountable in a man's actions that points him out to be such a mad man as is to be exempted from punishment it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such an one is never the object of punishment[4] Want of any motive for the doing of an act cannot be taken as evidence of maniacal tendency[5]

Partial delusion —Whether a person who, under an insane delusion as to the existing facts commits an offence in consequence thereof, is to be therefore excused depends upon the nature of the delusion If he labours under a partial delusion only, and is not in other respects insane he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists were real For example, if under the influence of his delusion, a person

and fortune, and killed him in revenge for such supposed injury he would be liable to punishment[6] If a person afflicted with an insane delusion, in respect of one or more particular subject or person, commits crime, knowing that he was acting contrary to law, but did the act complained of with a view, under the in

1 M & M 61

2 Per O Kinealy and Banerjee, JJ in *Kader Nasyer Shah* (1896) 23 Cal 604 607,

3 *Ram Sundar Das* (1919) 23 C W N 621 29 C L J 209

4 *Edward Arnold* (1724) 16 St Tr 69

704 Followed in *Tola Ram* (1927) 8 Lah 684, *Sardara* (1928) 29 Cr L J 287 See *Kazi Badur* (1928) 33 C W N 136

5 *Haynes* (1859) 1 F & F 666

ten's case, sup *Townl*

Moral insanity.—This is a form of insanity when a man's intellectual faculties are sound, but his moral sense is affected or diseased. The functions of the mind are of a twofold nature—those of the intellect, or faculty of thought, such as perception or judgment; and, those of the moral sentiments and affections, the propensities and the passion; and the latter may be diseased while the intellectual faculties are sound[1]. "We learn, however,....that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses. ....We are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired"[2].

The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions, or impressions, of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings; the sense of right and wrong being still, although it may be perverted, yet not destroyed, and the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject[3]. The circumstance of the *accused having acted under an irresistible influence to the commission of an* offence is no defence if at the time he committed the act he knew he was doing what was wrong. "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration"[4].

The circumstance of an act being apparently motiveless is not a ground from which the existence of an irresistible influence can be inferred. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief[5]. It is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act[6].

Insanity brought on by drunkenness.—The House of Lords have laid down after a review of English cases bearing on the subject that insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged only under certain circumstances. Evidence of drunkenness which

1 From the speech of Sir Alexander Cockburn in defence of M'Naghten.

2 Per O'Kinealy and Banerjee, JJ., in *Kader Nasyer Shah,* (1896) 23 Cal. 604, 608. See *Tola Ram,* (1927) 8 Lah. 684.

3 *Burton,* (1863) 3 F. & F. 772.

4 Per Bramwell, B., in *Haynes,* (1859) 1 F. & F. 666, 667; *Barton,* (1848) 3 Cox 275.

5 *Haynes,* (1859) 1 F. & F. 666, 667; *Sobha,* (1905) P. R. No. 40 of 1905.

6 *Michael Stokes,* (1848) 3 C. & K. 185, 188.

renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent In this case the accused ravished

is hand

suffo-

runken-

ness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other, and that the accused was guilty of murder[1]

Drunkenness is no excuse, but *delirium tremens* caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility[2] If voluntary drunkenness has caused a disease which has produced such incapacity as is mentioned in this section then the act

f a temporary nature[3] The accused

who was returning home, and with

a single stroke of a club as he passed

and then made off across a field The blow dealt was unpremeditated, there being no quarrel or dispute of any kind The evidence showed that the accused was addicted to intemperate habits by excessive use of opium, and that for some days before and after killing the boy the accused was irresponsible for his actions It was held that the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law[4] The accused after partaking of intoxicating liquor walked two miles in the sun to a village where he was hit on the head by another person He pursued that person to a certain house, but not finding him there he attacked and wounded with a club five women who were in the house The Civil Surgeon thought that the accused was not fully responsible for his actions owing to the mental state caused by the wound on the head, the alcohol he had taken, and the walk in the sun It was held that the facts were not sufficient to bring the case within the provisions of this section The term 'unsoundness of mind' cannot be construed so widely as to cover the loss of self control following a hostile blow on the head The assault on the women was the outcoml of hostile rage[5]

Homicidal mania —Homicidal mania or monomania is commonly defined to be a state of partial insanity, accompanied by an impulse to the perpetration of murder, from which it is also sometimes called impulsive or paroxysmal mania There may or may not be evidence of intellectual aberration, but the main feature of the disorder is the existence of a destructive impulse which, like a delusion, cannot be controlled by the patient The impulse, thus dominating over all other feelings, leads a person to destroy those to whom he is most fondly attached, or any one who may be involved in his delusion Sometimes the impulse is long felt, but concealed and restrained there may be merely signs of depression and

or wayward habits,

which may be going

o are in habits of

daily intercourse with the patients have been first astounded by the act of murder, and then only for the first time led to conjecture that certain peculiarities of language or conduct, scarcely noticed at the time, must have been symptoms of

1 *Director of Public Prosecutions* v. *Beard*, [1920] A C 479
2 *Davis* (1881) 14 Cox 563
3 *Bhelcka Aham*, (1902) 29 Cal. 493.
4 *Ibid*
5 *Maung Gyi*, (... B

insanity. Occasionally the act of murder is perpetrated with great deliberation, and apparently with all the marks of sanity[1]. Homicidal maniacs need have no motive to perpetrate the crime[2]. But because a murder is committed without a motive, irresistible influence of homicidal tendency cannot be inferred.[3].

Impulsive insanity.—It is said that on particular occasions men are seized with irrational and irresistible impulses to kill, to steal, or to burn, and that under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes...It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse...was really irresistible as well as unresisted. If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder. It would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones. The proof that an impulse was irresistible depends principally on the circumstances of the particular case. The commonest, and probably the strongest cases, are those of women who, without motive or concealment, kill their children after recovery from childbed[4].

3. 'Nature of the act or....what is either wrong or contrary to law'.—The question in each case must be, whether the accused person was in a state to know the nature of the act and its criminal character as against the law of the land. That is, it must be ascertained whether he was conscious of doing what he ought not to do.

A man may be suffering from some form of insanity in the sense in which the words would be used by an alienist but may not be suffering from unsoundness of mind as defined in this section. The law recognises nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing, he must always be presumed to intend the consequences of the action he takes. Where, therefore, the accused, after killing four persons in rapid succession with a *gandasa*, dropped it and began to run away, and subsequently volunteered information concerning the death of one of the deceased and there were no accomplices nor any evidence of motive, secrecy or prearrangement on the part of the accused, it was held that he had been rightly convicted of murder[5].

If the accused were conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable. His liability will not be diminished if he did the act complained of with a view, *under the influence of insane delusion*, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, if he knew that he was acting contrary to law[6]. A person may be both insane and responsible for his actions[7]. Where a man deliberately murdered his wife under the belief

1 Taylor's Medical Jurisprudence, Vol. I, (5th Ed.), pp. 806-807.
2 *Vaithinatha Pillai*, [1912] M. W. N. 825.
3 *Inayat*, (1928) 29 Cr. L. J. 1006.
4 Stephen's General View of Criminal Law of England, pp. 94, 95.
5 *Mani Ram*, (1926) 8 Lah. 114.
6 *M'Naghten's* case, (1843) 10 C. & F. 200; *Southey*, (1865) 4 F. & F. 864; *Leigh*, (1866) 4 F. & F. 915.
7 *Davis*, (1881) 14 Cox 563, 564; *Lachhman*, (1923) 22 A. L. J. 116.

that she was haunted by evil spirits, and that if he killed her the evil spirits would leave her, he was held guilty of murder[1].

The inquiry must be directed to the particular thing done and not to any other, because a man may be responsible for some things, and not for others Thus everything depends on the attitude of the prisoner's mind with regard to the particular act charged against him If it was a guilty mind with regard to that act, its general derangement will not be an excuse Thus, in the case of Lord Ferrers, who was tried before the House of Lords for the murder of his steward it was shown that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions, but as it appeared that the murder was deliberate and the Earl knew what he was doing he was executed[2]

Any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the right ness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong[3]

Where the unsoundness of mind deposed to is not such as would make the accused incapable of knowing the nature of the act, or that he is doing what is contrary to law, he cannot be exonerated from responsibility for crime under this section[4]

Where a person otherwise sane but labouring under the influence of an insane delusion commits an act of revenge for some supposed grievance or injury he is nevertheless punishable according to the nature of the crime committed, if at the time he understood that he was committing a wrong and unlawful act In other words, he must be considered in the same situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true[5] A person who is in a highly excited and unbalanced condition but is nevertheless conscious that what he is doing is wrong and a crime cannot be said to be of unsound mind within the meaning of this section[6] Where all that is proved is that a person who has committed a murder is conceited, odd irascible , and that his brain is not quite all right, it is insufficient to establish that the accused was incapable of knowing that what he was doing was wrong, and the provisions of this section are not applicable to his case[7]

Homicide by a person suffering from fever—Where an accused, who was suffering from fever which caused him while suffering from its paroxysms to be bewildered and unconscious, killed his children at being annoyed at their crying, but he was not delirious then, and there was no evidence to show that he was not conscious of the nature of his act, it was held that he could not be entitled to protection under this section[8] The accused stabbed a child (his brother's wife) with a sword and killed her No motive could be assigned for his attack on the child, and it appeared that he had been in the habit of treating the child kindly and affectionately He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania It was held that he was guilty of murder[9] Where it appeared that the accused was, at the time of the commission of the

1 *Seat Ali*, (1917) 3 P L W 356
2 *Earl Ferrers*, (1760) 19 St Tr 885, 947
3 [illegible] (1881) 14 Cox
[illegible]
Surgeon is criticised. See *Muhammad Husain*, (1912) 15 O C 321
5 *Ghinua Oraon*, (1917) 3 P L J, 291, 296, 19 Cr L J 135
6 [illegible]
7 [illegible]
8 [illegible]
9 [illegible]

offence, suffering from fever, his temperature was about 100 degrees, and he was not delirious, it was held that he could not be considered as temporarily insane[1].

Homicide by ganja-smoker.—The accused, an habitual *ganja*-smoker, killed his wife and children, because she quarrelled with him and objected to go to a village where he proposed to go. It was held that until the accused's habit of smoking *ganja* had induced in him such a diseased state of mind as to make him incapable of knowing the nature of his act or criminality, this section did not apply in his favour[2].

Homicide under the influence of religious enthusiasm.—Where a father sacrificed his son because wealth had not accompanied the son's birth and afterwards cut his own throat as a protest against his deity's injustice, he was held guilty of murder. The Court said: "Although there may have been some degree of religious enthusiasm or even hallucination, there is nothing to show that Bishen (the father) killed his child while in a state of mind that incapacitated him from knowing right from wrong. It seems to us rather that he did expect to receive some worldly benefit from the sacrifice of his son, and that wealth would come to him, and his dead child be restored to life again together"[3].

Melancholic homicidal mania.—The accused who was charged with committing murder was a young man of weak intellect, and the motive actuating the offence was trivial and inadequate. As soon as he had killed his uncle by hacking him on the head and neck with a sword, the accused rushed about, brandishing his weapon and shouting "Victory to Kali". He attempted to strike other persons including his own father. When the paroxysm had passed off, during the police inquiry, the accused appeared to be rational, but immediately afterwards he developed aphasia, attempted to commit suicide and was undoubtedly insane from that time for a period of five years. It was held that the above were the signs and indicia of insanity as expressed in works on the subject of medical-jurisprudence, and that the accused was suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword and was, by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and therefore he was not guilty of murder[4].

Homicide under the influence of morbid feeling.—The accused was seen near a boy who was playing in a public place. Some hours afterwards the child's dead body was found there; the throat was cut and there were marks of a violent struggle. The accused gave himself up and admitted the act, recounting all the circumstances with perfect intelligence. He said that he had done the act from a morbid feeling; that he was tired of life and wished to be rid of it. It was held that he was guilty of murder[5].

The accused killed his wife and child. There was no motive to explain the double murder and the accused admitted without reservation what he had done and made no attempt at concealment or escape. According to the accused his mind was blank at the time of the occurrence and he was not conscious of what he did. There was some evidence that the accused had not been quite himself, and that he had been disturbed and distressed by the shortage of cloth, rice and fodder. There was no reliable evidence that his intellect was deranged. It was held that he was guilty of murder[6].

[1] *In re Sengodai Vannan*, (1927) 53 M. L. J. 101.

[2] *Sakharam valad Ramji*, (1890) 14 Bom. 564; *Tincouri Dhopi*, (1922) 27 C. W. N. 290, 39 C. L. J. 34; *Budipiti Devasikamani*, (1927) 55 M. L. J. 228, 28 L. W. 77.

[3] *Bishendharee Kahar*, (1867) 7 W. R. (Cr.) 64, 66.

[4] *Shibo Koeri*, (1905) 10 C. W. N. 725; *Karma Urang*, (1927) 32 C. W. N. 342.

[5] *Burton*, (1863) 3 F. & F. 772.

[6] *Ram Sundar Das*, (1919) 23 C. W. N. 621, 29 C. L. J. 209.

through without suffering ...e of in- ... nding to kill, and that his expressions soon after the act were evidence of that, and that the alleged inadequacy of motive was immaterial, the question being not of motive but intent[1]

Homicide under the influence of insane delusions caused by loss of blood — A married woman killed her husband immediately after an apparent recovery from a disease which caused a great loss of blood and brought on insane delusions of the senses, and which had been renewed at the time of murder It was held that she had not been in such a state of mind at the time of the act as to know its nature or be accountable for it[2]

Homicide by a person in a paroxysm of insanity —Where a married woman ...

that she was not guilty as she had been in a paroxysm of insanity at the time of the act[3]

Homicide by a monomaniac —Where the accused, labouring under a notion that the inhabitants of Hadleigh and particularly one C were continually issuing warrants against him with intent to deprive him of his liberty and life shot C, it was held that the accused laboured under that species of insanity which was called monomaniac and was therefore not liable for his act[4]

Homicide by a person suffering from failure of reasoning powers —Where the accused cut his wife's throat without any rational motive, and was captured at once without any attempt on his part to escape or offer resistance, and the evidence showed that before the commission of the offence he suffered from failure of reasoning powers and also that he entertained delusions as to dangers which threatened his wife It was held that the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act[5]

Attempt to commit homicide —The accused was convicted of attempt to commit murder (s 307) It was found from the evidence of the prosecution witnesses that he was known as "Mad Nga Pyan", that immediately before his attack he was noticed by persons to be in one of his mad fits, that he was suffering under a delusion that one whom he attacked was keeping his sisters and daughters in the monastery, that he confessed to the investigating officer and the headman that he stopped going on with the attack when he was asked to do so, that the act was utterly unprovoked and motiveless It was held under these circumstances that the accused at the time of committing the offence was incapable by reason of unsoundness of mind of knowing the nature of the act or that it was wrong or contrary to law[6].

PRACTICE.

Evidence.—The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane are held not to justify the conclusion that the accused at the time of committing the offence was of unsound mind[7] But to prove a plea of insanity, evidence that the grandfather of the person had been insane may be adduced, after it has been proved by medical testi-

[1] *Dixon* (1869) 11 Cox 341
[2] *Law*, (1862) 2 F & F 836
[3] *Vyse*, (1862) 3 F & F 247
[4] *Offord*, (1831) 5 C. & P 168
[5] *Dil Gani*, (1907) 34 Cal. 686 ... *Anandi*, (1923) 45 All 329
[6] *Nga Pyan* (1911) 4 P ...
[7] *Jeera Amtha*, (18..) ...

mony that such a disease is often hereditary in a family[1]. Evidence as to the accused's conduct before and after up to the time of trial is admissible as pesumptive evidence of his mental condition when the act was committed. The absence of all motive for a crime, when corroborated by independent evidence of the accused's previous insanity, is not without weight[2].

Evidence of experts is relevant in matters of insanity[3]. A deposition of a Civil Surgeon directed by s. 464 of the Criminal Procedure Code should be taken. He should be questioned as to the number of times he had himself seen the accused, the nature of his conversation with him, and all the circumstances from which he is led to regard him of sound or unsound mind[4].

A medical man, conversant with the disease of insanity, who never saw the accused previously to the trial, but who was present during the whole trial and the examination of all the witnesses, cannot be asked his opinion as to the state of the accused's mind at the time of the commission of the alleged crime, or his opinion whether the accused was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time. Because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put, though the same cannot be insisted on as a matter of right[5]. In a subsequent case, however, it was decided that, notwithstanding the opinion of the judges in *M'Naghten's* case, a physician who had been in Court during the whole trial could not be asked whether, having heard the whole evidence, he was of opinion that the accused at the time he committed the alleged act was of unsound mind. The proper mode of examination was to take particular facts, and assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the accused at the time the alleged act was committed[6]. A medical man may be asked whether such and such appearances proved by other witnesses are, in his judgment, symptoms of insanity. But he cannot be asked whether, from the other testimony given, the act with which the accused is charged is, in his opinion, an act of insanity, as this is the very point to be decided by the jury[7]. He may give his opinion as to the state of mind, not as to the responsibility of the accused. The latter is for the jury, under the direction of the judge[8]. Where, for instance, a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit though there is nothing before or after the act to indicate it[9]. The subtle essence which we call 'mind' defies, of course, ocular inspection and can only be known by its outward manifestations. By the language and conduct of the man, his thoughts and emotions are read. According as they conform to, or contrast with, the practice of people of sound mind, the large majority of mankind, we form our judgment as to his mental soundness. For this reason evidence is admissible to show that his conduct and language at different times and on different occasions indicated some morbid condition of his intellectual powers; and the more extended the view of his life, the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant. Evidence as to insanity in his parents and immediate relatives may also be pertinent. It is never allowable to infer insanity in an accused person from the mere fact of its existence in his ancestors. But when testimony directly tending to prove insane conduct on the part of the

1 *Ross Tucket*, (1844) 1 Cox 103.
2 *Sheik Mustaffa*, (1864) 1 W. R. (Cr.) 19.
3 Indian Evidence Act (I of 1872), s. 45.
4 *Gonoo* v. *Deenbundhoo*, (1851) N. A. R. 24.
5 6th question and answer in *M'Naghten's* case, (1843) 10 C. & F. 200.
6 *Frances*, (1849) 4 Cox 57.
7 *John Wright*, (1823) R. & R. 456; *Searle*, (1831) 1 M. & R. 75.
8 *Richards*, (1858) 1 F. & F. 87.
9 *Ibid.*

accused himself has been given evidence of his family antecedents is admissible as corroborative of that testimony[1] Where a plea of insanity is set up the accused s counsel has no right in his address to the jury to quote the opinions of medical men as given in their works[2] Because a case from a work on medical jurisprudence is no evidence in a Court of Justice It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present[3]

The fact of unsoundness of mind is one which must be clearly proved before any jury is justified in returning a verdict[4]

Presumption —The law presumes every person at the age of discretion to be sane unless the contrary is proved and even if a lunatic has lucid invervals the law presumes the offence of such person to have been committed in a lucid interval unless it appears to have been committed during derangement[5]

This point has been elaborately discussed in a case in which it is said There is some difference of opinion between medical and legal jurists namely how far insanity may be inferred solely from the nature of the act complained of and the conduct of the accused in respect of it I am concerned only with the legal and not with the medical view of the question and there is ample judicial authority for the view that it is utterly unsafe to admit a defence of insanity upon arguments merely derived from the character of the crime

In *Regina* v *Stokes*[6] Rolfe B said —It would be a most dangerous doctrine to lay down that because a man committed a desperate offence with the chance of instant death or the certainty of future punishment before him he was therefore insane—as if the perpetration of crimes was to be excused by their very atrocity'

In *Regina* v *Haynes*[7] Bramwell B said to the jury — It has been urged that you should acquit him the prisoner on the ground that it being impossible to assign any motive for the perpetration of the offence he must have been acting under what is called a powerful and irresistible influence or homicidal tendency But the circumstance of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence Motives exist unknown and in un erable which might prompt the act A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief But if an influence be so powerful as to be termed irresistible so much the more reason is there why we should not withdraw any of the safeguards [illegible] itself be held a legal excuse rendering the crime dispunishable you at once with draw a most powerful restraint—that forbidding and punishing its perpetration'

These remarks are very pertinent in a country where we have constantly to deal with criminals upon whose savage instincts neither religion nor conscience can be serio sly regarded as restraints and who can only be kept from the most atrocious cri nes agai st the persons of others by their fear of the law Human nature is manifold Man *at his best* is only a very highly developed animal, with all the instincts and passions of the inferior animals In him they are softened, modified and controlled by generations of civilization and education and re strained by example social opinion and the fear of punishment in this world or the next Man *at his worst* is very little above the lower animals and is only made more dangerous by that reason which distinguishes him from them With

[1] Per Cox, J in *United States* v *Guitean* 10 Fed. Rep 161 *Pass Tucket* (1844) 1 Cox 103

[2] *Crouch* (1844) 1 Cox 94

[3] *Robert Taylor* (18 4) 13 Cox 77

[4] *Nobin Chunder Bannerjee* (1873) 20 W R. (Cr) 0 13 Beng L. R App 20

[5] *Balu* (1881) Unrep Cr C. 179 *Sheodin* (1901) 21 A. W N 132 *Nobin Chunder Bannerjee* sup

[6] (1848) 3 C. & K 185 189

[7] (1859) 1 F & F 666,

him, criminal longings are natural and familiar, and he is only kept from yielding to them by a dread of punishment. Cruelty—that is, a desire to inflict suffering for the pleasure of witnessing it—is a natural instinct. We find it in the highly civilized and educated despot who is freed from all restraint by the possession of absolute power: we find it in all classes of reasoning mankind: we find it in children who are left to follow the promptings of their own natures: and we find it in nearly all the lower animals. It is this natural instinct which lends to a real battle far more interest than is conveyed by the most scientific of sham fights, not only to those fighting, but to those looking on, whatever may be the excuses and justifications used to cover the bloodshed. It is because of this natural instinct that the most humane, educated, highly civilized, and sometimes most religious, sportsmen are conscious—very clearly conscious—of a greater pleasure in shooting at living game than at inanimate targets of any kind, however carefully devised to satisfy the mere desire for skill in the use of weapons. Many other instances of the kind might be put forward. Education, religion, civilization, all strive to cover up or find excuses for this blood-thirstiness, but it is there as part of our animal nature; it may be controlled into absolute impotence, but it can never be eradicated.

"The crime called 'running *amok*' is common enough in India. In some few cases it may be due to real insanity, or to a temporary mental disorder caused by drugs or other intoxicants. But I believe that in the majority of cases it is nothing but the reckless indulgence of a natural desire to kill. The records of criminal justice in India teem with cases where the injury inflicted by the criminal on his victim is out of all proportion to the motive or provocation which gave rise to the crime, and this, where there has not been the least reason for suspecting any degree of insanity. I have, in my own limited experience, had cases where a young boy, some 15 years of age, killed his sleeping father for the sake of getting hold of five rupees in the pocket of the latter; where a young man killed his sleeping mother after deliberate premeditation, because a petty dispute as to his share in the family rice crop; and where a perfectly sane and affectionate father dashed out the brains of his favourite child—a boy 2 or 3 years of age—in order to point a curse at a creditor who was pressing him for a petty debt. Each of these cases simply shewed the breaking out of a naturally savage nature, through the feeble, artificially created, restraint which usually kept it down.

"In the cases of a large majority of Indian rustics of the class of the accused, the lack of education and the narrow vista of a village life, result in their having only a vague idea of the power of the law, and their want of knowledge and imagination prevents them from realising anything even approximate to the more serious of the consequences that may ensue from disobedience to it. It is not therefore surprising that in moments of mental excitement this restraining phantom easily fades from view, and acts are done that shock and surprise educated and law-abiding men, and give them an impression that mental derangement alone can account for such criminality. It is such an impression, no doubt, that led the District Magistrate in the present case to his finding of what has been called 'inferential insanity'. But it was an erroneous inference. It probably arose from an unconscious but natural tendency which we all have of judging others by ourselves. The Magistrate having concluded with ease and certainty that he would never have committed such motiveless acts of violence except in a state of insanity, proceeded to infer that nobody else, including the criminal before him, would likewise do them except under a like disability. We often hear the expression 'No one but a mad man would do such a thing': but a closer examination will always convince the speaker that he is measuring others by the standard of his own mind, and running all the risks of inaccuracy which attend upon the custom of drawing general conclusions from particular cases. When dissected in this way, the fallacy of the argument that because no sane District Magistrate

would run *amok*, wounding people with an axe, therefore no illiterate rustic would do so, unless insane, will be evident to everybody Circumstantial evidence, to justify a judicial finding solely based on it, must be of a kind which excludes all other reasonable and probable hypotheses except the one set up The accused in this case suddenly wounded two men, apparently without motive, and laughed when questioned about his conduct shortly after Such conduct is of course consistent with his being insane but it is at least equally consistent with the mere indulgence of a savage but reasoning instinct—with a brutal but perfectly sane desire to cause bloodshed—with a foolish and reckless but still not insane craving for notoriety—and with possibly one or more of several other rational and culpable states of mind Therefore accused's conduct alone cannot furnish a safe, or even a legal, basis to support the theory of insanity of any kind—let alone legal insanity—to the exclusion of all these other hypotheses with equal claims to a *locus standi* The finding of the Magistrate is unsupported by any evidence of hereditary tendency towards mental disorder, or of any other cause for impairment of the intellect, or of a single display of previous or subsequent eccentricity on the part of the accused, and it is therefore impossible to sustain the inference

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of a consciousness in his mind that he had done what was wrong So that, even if we could infer the presence of a certain amount of mental derangement, it did not amount to legal insanity, since the cognitive faculty had apparently not been destroyed by it"[1]

Onus.—The burden of proving the defence afforded by this section rests on the accused[2] That onus may be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition, his family history and so forth Mere absence of motive is not a sufficient ground upon which mania may be inferred[3] But if it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception[4] Mental derangement a year previous to the act being committed, combined with peculiar circumstances, *has been held sufficient to shift the burden of proof*[5] The evidence must prove an alienation of reason preventing the moral sense[6]

Procedure.—The procedure for the trial of insane persons is laid down in Chap XXXIV of the Code of Criminal Procedure

Where the *defence of insanity is set up in order to warrant the jury in* acquitting the accused, it must be proved affirmatively that he is insane, if the fact be left in doubt, and if the crime charged in the indictment be proved it is their duty to convict[7]. The plea of insanity can be raised even in appeal[8]

Punishment.—Partial delusion, or the mere existence of mental disease, does not exempt a person from criminal responsibility, though mental weakness, caused by disease is an extenuating circumstance affecting the sentence[9] The accused had intentionally killed another man, and it was found on the evidence that he was at the time insane, but not to such a degree that he did not know the nature

[1] *Kalay Kisan*, (1904) 17 C P L. R 113, 124

[2] *Irapa*, (1895) Unrep Cr C 818; *Niaz Ali*, (1904) 2 A W N 2, *Kalay Kisan*, sup, *Chandu Lal*, (1923) 21 A L J 776, *Budipiti Deranlamani*, (1927) 53 M L J 228, 27 L W 771

[3] *Bahadur*, (1927) 9 Lab 371

[4] *Musammat Anandi*, (1923) 45 All 329

[5] *Arzao Bebee*, (1865) 2 W R (Cr) 33

[6] *Nobin Chunder Banerjee*, (1873) 20 W R (Cr) 70, 13 Beng L. R App. 20

[7] *Michael Stokes*, (1848) 3 C. & K 185

[8] *Arthur Canham*, (1925) Cr A.

[9] *Nepal* (1886) Unr

Tha, (1896) P J L.

ıis act or that what he was doing was wrong and contrary to law. It was held t, although the accused was not entitled to the benefit of this section, it was proper that he should be hanged, but rather he should be sentened to transtation for life, so that the Government might be in a position to make such :lification (if any) of the sentence as might be indicated by further observation he accused[1].

Acquittal.—*The following is suggested as a suitable form of finding of* uittal on the ground of insanity:—

"The Court, concurring with the Assessors, finds that——did kill——by king him on the head with a club, but that, by reason of unsoundness of mind, was incapable of knowing that he was doing an act which was wrong or conry to law, and that he is not therefore guilty of the offence specified in the rge, viz.,—and the Court directs that the said——be acquitted, and that, under provisions of s. 471, Criminal Procedure Code, the said——be kept in safe tody in the——pending the orders of the Local Government"[2].

.ct of a person ›pable of judg- ıt by reason of ›xication caused inst his will.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without ; knowledge[1] or against his will.

COMMENT.

Voluntary drunkenness *is no excuse for the commission of a crime*[3]. *At* same time drunkenness does not, in the eye of the law, make an offence the re heinous[4]. *It is a species of madness for which the mad man is to blame.* ɜ law pronounces that the obscuration and divestment of that judgment and nan feeling which in a sober state would have prevented the accused from ɜnding, shall not, when produced by his voluntary act, screen him from ıishment, although he be no longer capable of self-restraint[5]. *Qui peccat ebrius, t sobrius*: let him who sins when drunk be punished when sober[6].

"If a man choses to get drunk, it is his own voluntary act: it is very different m a madness which is not caused by any act of the person. That voluntary ›cies of madness which it is in a party's power to abstain from, he must answer . However, with regard to the intention, drunkenness may perhaps be verted to according to the nature of the instrument used. If a man uses a stick, ı would not infer a malicious intent so strongly against him, if drunk, when he ıde an intemperate use of it, as you would if he had used a different kind of apon; but where a dangerous instrument is used, which, if used, must produce evous bodily harm, drunkenness can have no effect on the consideration of the ılicious intent of the party."[7]

Although simple frenzy occasioned immediately by drunkenness is no excuse t if by one or more such practices, an habitual or fixed frenzy be caused, though s madness was contracted by the vice and will of the party, yet this habitual

· *Lachhman*, (1923) 46 All. 243.
: C. H. R. and O., Vol. I, Ch. I, s. 149, p. 54.
ı *Somya Hirya Mahar*, (1918) 20 Bom. L. R.), 4 Bom. Cr. C. 283.
: *Bodhee Khan*, (1866) 5 W. R. (Cr.) 79; *odh Dass*, (1856) P. R. No. 41 of 1866.
ɫ *Zoolfkar Khan*, (1871) 16 W. R. (Cr.) 36, Beng. L. R. App. 21.
5 7th Parl. Rep., s. 19.
6 *Kendrick* v. *Hopkins*, (1580) Cary's Rep. 133.
7 Per Alderson, B., in *Meakin*, (1836) 7 C. & P. 297; *Patrick Carroll*, (1835) 7 C. & P. 145; contra, *John Thomas*, (1837) 7 C. & P. 817; *Pearson*, (1835) 2 Lewin 144.

and fixed frenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first[1]

1. 'Without his knowledge'—If a man is made drunk through stratagem or the fraud of others, or through ignorance, or through any other means causing

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puts him into the same condition as any other frenzy, and equally excuses him[2]

86 In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will

Offence requiring a particular intent or knowledge committed by one who is intoxicated

COMMENT.

As certain guilty knowledge or intention forms part of the definitions of many offences, this section is provided to meet those cases It says that a person voluntarily drunk will be deemed to have the same knowledge as he would have had if he had not been intoxicated

The second part of the section speaks of knowledge only and omits any reference to intent Whether this omission is intentional or not, it may be due to the fact that in the majority of cases the question of intention is merely the question of knowledge If the accused knew what the natural consequences of his acts were, ordinarily he must be deemed to have intended to cause them Though ordinarily intention is to be inferred from knowledge there must be cases where

criminal intent requisite for the offence[3]

In England it has been held that where the intention of a person committing a crime is an element of the crime itself, the fact that he was intoxicated at the time he committed the act may be taken into consideration in considering whether he formed the intention necessary to constitute the crime[4]. The House of Lords after referring to various cases have laid down that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was

gave way to some violent passion, does

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has held that intoxication may reduce

1 1 Hale P C 32 See Comment on s 84 See also *John Burrow*, (1823) 1 Lewin 75, *William Rennie*, (1825) 1 Lewin 76

2 1 Hale P C 32

3 *Budipati Devasikamani*, (1927) 55 M. L J 228, 27 L. W 77

4 *Doherty* (1887) 16 Cox 306. See also

of his act or that what he was doing was wrong and contrary to law. It was held that, although the accused was not entitled to the benefit of this section, it was not proper that he should be hanged, but rather he should be sentenced to transportation for life, so that the Government might be in a position to make such modification (if any) of the sentence as might be indicated by further observation of the accused[1].

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Act of a person incapable of judgment by reason of intoxication caused against his will.

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COMMENT.

Voluntary drunkenness is no excuse for the commission of a crime[3]. At the same time drunkenness does not, in the eye of the law, make an offence the more heinous[4]. It is a species of madness for which the mad man is to blame. The law pronounces that the obscuration and divestment of that judgment and human feeling which in a sober state would have prevented the accused from offending, shall not, when produced by his voluntary act, screen him from punishment, although he be no longer capable of self-restraint[5]. *Qui peccat ebrius, luat sobrius*: let him who sins when drunk be punished when sober[6].

"If a man choses to get drunk, it is his own voluntary act: it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."[7]

Although simple frenzy occasioned immediately by drunkenness is no excuse yet if by one or more such practices, an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual

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2 C. H. R. and O., Vol. I, Ch. I, s. 149, p. 54. See *Somya Hirya Mahar*, (1918) 20 Bom. L. R. 629, 4 Bom. Cr. C. 283.

3 *Bodhee Khan*, (1866) 5 W. R. (Cr.) 79; *Boodh Dass*, (1856) P. R. No. 41 of 1866.

4 *Zoolfkar Khan*, (1871) 16 W. R. (Cr.) 36, 8 Beng. L. R. App. 21.

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and fixed frenzy thereby caused puts the man into the same condition in relation to crimes as if the same were contracted involuntarily at first[1]

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In England it has been said that where the [illegible] ting a crime is an element [illegible] the time he committed [illegible] whether he formed the intention necessary [illegible] of Lords after referring to various cases [illegible] ness which renders the accused incapable [illegible] to constitute the crime [illegible] proved in order [illegible] drunkenness falling short [illegible] necessary to constitute the crime, and [illegible] affected by drink [illegible] not [illegible] The Court [illegible]

[illegible]

1 1 Hale P C [illegible]
2 1 Hale P C [illegible]
3 [illegible]
4 [illegible]

person, above eighteen years of age, who has given consent[2], whether express or implied, to suffer that harm, or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

ILLUSTRATION

A and Z agree to fence with each other for amusement This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play, and if A while playing fairly, hurts Z, A commits no offence

COMMENT.

This section appears to proceed upon the maxim *volenti non fit injuria* he who consents suffers no injury This rule is founded upon two very simple propositions (1) that every person is the best judge of his own interest, (2) that no man will consent to what he thinks hurtful to himself

Every man is free to inflict any suffering or damage he chooses on his own person and property, and if instead of doing this himself he consents to its being done by another, the doer commits no offence A man may give away his property, and so another who takes it by his permission does not commit theft He may inflict self torture or he may consent to suffer torture at the hands of another[1] The authors of the Code say "We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm The restrictions by which the rule is limited affect only cases where human life is concerned Both the general rule and the restrictions may we think, be easily vindicated If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stable shall be shot that his plate shall be thrown into the sea, those who obey his orders however capricious those orders may be however deeply Z may afterwards regret that he gave them ought not, as it seems to us, to be punished for injuring his property Again if Z chooses to sell his teeth to [illegible] who perform the rite ought not to be punished for injuring Z's person

"The reason on which the general rule which we have mentioned rests is this that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions It is by no means true that men always judge rightly of their own interest But it is true that in the vast majority of cases they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of [illegible]

does not afford any answer to the criminal charge of assault[1] All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do anything[2] No persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts[3] All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger are unlawful[4] There is nothing unlawful in sparring unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game Therefore, except in the latter case, death caused by an injury received during a sparring match, does not amount to manslaughter[5]

If death ensue in consequence of such games as are entered into to give strength, skill, or activity in the use of arms, or for sport or recreation, as wrestling by consent, playing at cudgels, fencing archery, etc , it is held in England to be mis adventure The true principle which distinguishes such cases from those where death ensues in consequence of an intent to do a slight injury is, that here bodily harm is not the motive on either side Proper caution and perfect fair play should be used on both sides for, if any improper advantage be taken, it will amount to manslaughter[6] If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter In such a case it is immaterial to consider whether the act which caused death was in accordance with the rules and practice of the game

though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms For if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death ensued , the want of due and friendly caution would make such act amount to manslaughter, but

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PRACTICE

Evidence.—Prize fight.—Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter[9].

Act not intended to cause death done by consent in good faith for person's benefit

88 Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit[1] it is done in good faith, and who has given a consent[2], whether express or implied, to suffer that harm, or to take the risk of that harm

[1] *Coney* (1882) 8 Q B D 534, *Perkins*, (1831) 4 C & P 537, *Orton*, (1878) 14 Cox 226
[2] *Edward Murphy* (1833) 6 C & P 103
[3] *Bradshaw*, (1878) 14 Cox 83.
[4] *Canniff* (1840) 9 C & P 359
[5] *Young*, (1866) 10 Cox 371
[6] Alison, 144
[7] *Bradshaw*, (1878) 14 Cox 83
[8] 1 East P C. 269
[9] *James Hargrave*, (1831) 5 C. & P. 170.

ILLUSTRATION.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

COMMENT.

No consent can justify an intentional causing of death. But a person for whose benefit a thing is done, may consent that another shall do that thing, even if death may probably ensue. The last section allows any harm to be inflicted short of grievous hurt: this section sanctions the infliction of any harm as it is for the benefit of the person to whom it is caused.

The authors of the Code say: "In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigour. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to unish them, though they might by firing cause his death, and though when they d they knew themselves to be likely to cause his death. We propose, therefore, t it shall be no offence to do even what the doer knows to be likely to cause eath if the sufferer being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary, intended in good faith the benefit of the sufferer"[1]. See also s. 91, *infra.*

1. **'Benefit'.**—Mere pecuniary benefit is not benefit within the meaning of this section[2].

2. **'Good faith, and who has given a consent'.**—Nothing is said to be done in good faith which is done without due care and attention[3]. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon undertakes that he will perform a cure, but he does not undertake to use the highest possible degree of care and skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill. He does not undertake to use the highest possible degree of skill[4]. Any person, whether a licensed medical practitioner or not, who deals with the life or

[1] Note B, p. 108.
[2] Explanation to s. 92, *infra.*
[3] Section 52, *supra.*
[4] *Lanphier v. Phipos,* (1838) 8 C. & P. 475.

ealth of any person, is bound to have competent skill, and is bound to treat his
atients ... son dies for want of
ther, th ... medical man liable for
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ss degree of skill than some other medical men might have shown or a less degree
f care than even he himself might have bestowed, nor is it enough that he him
lf acknowledges some degree of want of care, there must have been a want of
ompetent and ordinary care and skill, and to such a degree as to have led to a
ad result[2] The Court (or the jury) has to consider whether in the execution of
hat duty which a doctor had undertaken to perform he is proved to have shewn
... ross and culpable want of skill as any person
... to be guilty of[3] The question is whether
... used acted with criminal inattention and
arelessness[4]

But if a person bona fide and honestly exercising the best skill to cure a patient, perform an operation which causes the patient's death he is not guilty f manslaughter and it makes no difference whether the party be a regular or an rregular surgeon[5]

Unqualified persons —The Law Commissioners observe that this section will not excuse dangerous operations performed by unqualified persons We apprehend that 'an unqualified and ignorant quack' could hardly be excused for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life but by misrepresentation, and such a one could hardly satisfy a Court of Justice that he had undertaken the operation in good faith under cl 72 (this section) for good faith must surely be construed here to mean a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant [6]

A person not qualified as not being a regular medical practitioner but assuming to be, or to practise as such and undertaking to treat another for a disease is liable for injury caused by ignorant and improper treatment by which the patient is rendered worse instead of better and is injured by the use of improper medicine[7] A person who so 'takes a leap in the dark' is guilty of gross negligence[8] Death caused by administering an improper medicine is man laughter[9] But even an unlicensed practitioner will not be criminally responsible for the death of a person, occasioned by his treatment unless his conduct is ...

A person uneducated in matters of surgery operated on a man for internal piles by cutting them with an ordinary knife and the man died from hæmorrhage He was charged, under s 304A, with causing death by doing a rash and negligent act It was contended that, inasmuch as the accused had performed similar operations on previous occasions, it was not a rash act within the meaning of that section and that at all events he was entitled to the benefit of this section as he did th act in good faith, without any intention to cause death and for the benefit of th patient who had accepted the risk. It was held that having regard to the meaning of good faith' he was not entitled to the benefit of this section

[1] *Catherine Spiller* (1832) 5 C. & P 333.
[2] *Rich v Pierpont* (1862) 3 F & F 35.
[3] *Ferguson's case* (1830) 1 Lewin 181
[4] *Crook* (1859) 1 F & F 521
[5] *Van Butchell* (1829) 3 C & P 629
[6] 1st Rep. s. 123.
[7] *Ruddock v Lowe* (1865) 4 F & F 519
[8] *Markuss* (1864) 4 F & F 356.
[9] *Nancy Simpson's case* (1829) 1 Lewin 172
Joseph Webb (1834) 2 Lewin 196.
[10] *John Long* (1830) 4 C. & P 398.
[11] *John Long* (1831) 4 C. & P 423.

and that this section did not apply to the case, as it was not shown by the accused that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk[1].

The accused operated upon a patient for cataract, with the result that the patient lost the sight of her left eye. It was found that the operation was performed with the consent of the patient, and in good faith and for her benefit, and that it was performed in accordance with the recognized Indian method of treatment for cataract. It was held that the accused had committed no offence under the Code[2].

English cases.—In an action against a chemist and druggist upon an alleged retainer (as a surgeon and apothecary) to treat the plaintiff for a certain disorder (for which mercurial treatment was improper), it was held that mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain an action[3]. A person in the habit of acting as a man-midwife tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, as a result of which the patient died. It was held that he was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention[4]. The accused, a person not a regular practitioner, administered lobelia, a dangerous medicine, which produced death. It was held that the question for the jury was whether he had acted so rashly and carelessly as to cause death[5]. Any person who deals with the life or health of another person is bound to use competent skill and sufficient attention; if the patient dies for the want of either, the person is guilty of manslaughter[6].

Act done in good faith for benefit of child or insane person, by or by consent of guardian.

89. Nothing which is done in good faith[1] for the benefit[2] of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause, to that person: Provided—

Provisos.

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

1 *Sukaroo Kobiraj,* (1887) 14 Cal. 566. See *Baboolun Hijrah,* (1866) 5 W. R. (Cr.) 7.
2 *Suraj Bali,* (1908) 28 A. W. N. 91, 5 A. L. J. 155.
3 *Jones* v. *Fay,* (1865) 4 F. & F. 525.
4 *John Williamson,* (1807) 3 C. & P. 635.
5 *Crick,* (1858) 1 F. & F. 519.
6 *Burdee,* (1916) 25 Cox 598.

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

ILLUSTRATION.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

COMMENT.

This section empowers the guardian of an infant under twelve years or an insane person to consent to inflict harm on the infant or the insane person provided it is done in good faith and is done for his benefit. Persons above twelve years are considered to be capable of giving consent under s. 88.

Object.—The authors of the Code observe: "A lunatic may be in a state which makes it proper that he should be put into a strait waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offence. We have therefore provided, by clause 71 (this section), that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind". See also s. 92, *infra*.

The following illustrations had been given by the authors of the Code to illustrate the meaning of this section; but except illustration (d) all were omitted by the Commissioners. They, however, elucidate the purport of the section very clearly:—

(a) A, a parent, whips his child moderately for the child's benefit. A has committed no offence.

(b) A confines his child for the child's benefit. A has committed no offence.

(c) A in good faith, for his daughter's benefit, intentionally kills her to prevent her from falling into the hands of Pindarees. A is not within the exception.

(d) A in good faith, for his child's benefit, without his child's consent, has his child cut for the stone, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A has committed no offence, inasmuch as his object was the prevention of death or grievous hurt to the child.

(e) A in good faith, for his child's pecuniary benefit, emasculates his child. Here, inasmuch as A has caused grievous hurt to the child for a purpose other than the preventing of death or grievous hurt to the child, A is not within the exception.

(f) A, intending in good faith the pecuniary benefit of Z, his daughter, a child under twelve years of age, abets a rape committed by B on Z. Neither A nor B is within the exception.

1. 'Good faith'.—See s. 52, *supra*.

2. 'Benefit'.—Mere pecuniary benefit is not benefit within the meaning of this section.

A school-master may for purposes of discipline inflict moderate punishment and such punishment may be inflicted for offences committed not only within the

that the accused was guilty of an indecent assault. But both these cases were unfavourably commented upon in *R.* v. *Clarence*,[1] which practically lays down that concealment of the physical condition of the accused is not such a fraud as to create criminal liability. In this case the accused had connection with his wife at a time when he was suffering from gonorrhœa, the wife not knowing about the disease. It was held that the conduct of the accused did not amount to assault occasioning actual bodily harm. In each of the two cases mentioned above the prosecutrix was a young girl and not a town woman. In the case of a town woman a question may be raised as to the implied consent to take risks flowing from promiscuous embraces.

PRACTICE.

Evidence.—The onus of proving consent is on the accused. The evidence of consent which would be sufficient in a civil transaction must be equally sufficient in exculpation of an accused's guilt[2].

Exclusion of acts which are offences independently of harm caused.

91. The exceptions in sections 87 and 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

ILLUSTRATION.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

COMMENT.

This section says in explicit terms that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. If the act is an offence independently of the harm which it has caused then the doer will not be protected by the consent given.

Act done in good faith for benefit of a person without consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit[1] it is done in good faith[2], even without that person't consent[3], if the circumstances are such that is is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided—

Provisos.

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

1 (1889) 22 Q. B. D. 23, 16 Cox 511. See also *Hegarty* v. *Shine*, (1878) 14 Cox 145, where the Court expressed the opinion that the concealment of a venereal disease from a woman could not constitute an assault.

2 *Anunto Rurnagat*, (1866) 6 W. R. (Cr.) 57.

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt[4] or the curing of any grievous disease or infirmity;

Thirdly—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt,

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend

ILLUSTRATIONS

(*a*) Z is thrown from his horse and is insensible A, a surgeon, finds that Z requires to be trepanned A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself A has committed no offence

(*b*) Z is carried off by a tiger A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit A's ball gives Z a mortal wound A has committed no offence

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed There is not time to apply to [illegible] in spite of the entreaties of the [illegible] A has committed no offence

[illegible], a child People below hold out a blanket A drops the child from the house top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit Here, even if the child is killed by the fall, A has committed no offence

Explanation—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

COMMENT.

The logical place of this section would be after s 89

Object.—The principal object of ss 88, 89 and this section is protection of medical practitioners The authors of the Code observe —

"There yet remains a kindred class of cases which are by no means of rare occurrence For example, a person falls down in an apoplectic fit Bleeding alone can save him, and he is unable to signify his consent to be bled The surgeon who bleeds him commits an act falling under the definition of an offence The surgeon is not the patient's guardian, and has no authority from any such guardian, yet it is evident that the surgeon ought not to be punished Again, a house is on fire A person snatches up a child too young to understand the danger, and flings it from the house top, with a faint hope that it may be caught in a blanket [illegible] probable it will be dashed to pieces [illegible] fall, though the person who threw it [illegible] killed, and though he was not the child's parent or guardian, he ought not to be punished

"In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime

is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by clause 72 (this section) a protection very similar to that which we have given to the acts of regular guardians"[1].

The following illustrations[2] further elucidate the meaning of the section:—

(1) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

1. **'Benefit'.**—See explanation.

2. **'Good faith'.**—See s. 52, *supra.*

Where the accused, a man of education and wealth and living in a town where medical attendance could be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in a cruel way, it was held that he could not be said to have acted with due care and attention and was guilty of an offence under s. 344[3].

3. **'Consent'.**—See s. 90, *supra.*

4. **'Grievous hurt'.**—See s. 320, *infra.*

5. **'Hurt'.**—See s. 319, *infra.* Section 89 provides for 'grievous hurt' in a similar case.

6. **'Pecuniary benefit'.**—The explanation to this section, coupled with s. 88, does not justify the performing of a dangerous surgical operation by an unskilled person, although it was not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitting to it[4].

Communication made in good faith.

93. No communication made in good faith[1] is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

ILLUSTRATION.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

COMMENT.

This section is introduced to protect the innocent without unduly cloaking the guilty. It requires that communication should have been made (1) in good faith, and (2) for the benefit of the person to whom it is made. The illustration speaks of the case of a surgeon. Very often a timely warning to the patient of his approaching death is necessary in order that he may be able to arrange his affairs to his own satisfaction. In such a case the doctor will be protected under this section if the patient dies of the shock resulting from the communication.

1. **'Good faith'.**—See s. 52, *supra.*

[1] Note B, p. 109.
[2] Stephen's Digest of Crim. Law, Art. 266.
[3] *Shimbhu Narain*, (1923) 45 All. 495.
[4] *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.

94 Except murder[1], and offences against the State[2] punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it reasonably cause the apprehension that instant death[3] to that person will otherwise be the consequence Provided the person doing the act did not of his own accord or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint

Act to which a person is compelled by threats

Explanation 1 —A person who, of his own accord or by reason of a threat of being beaten joins a gang of dacoits knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law

Explanation 2 —A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law for example a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it is entitled to the benefit of this exception

COMMENT

The Indian law about compulsion and necessity as a justification of an act otherwise criminal is based on the law of England By this section a person is excused from the consequences of any act except (1) murder[1] and (2) offences against the State punishable with death done under fear of instant death Fear of hurt or even of grievous hurt is not a sufficient justification In English law fear of grievous hurt is a good justification

Object —Stephen[2] says Criminal law is itself a system of compulsion on the widest scale It is a collection of threats of injury to life liberty and property if people do commit crimes Are such threats to be withdrawn as soon

says to a man intending

w to withdraw its threat

Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary It is of course a misfortune for a man that he should be placed between two fires but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands If impunity could be so secured a wide door would be opened to collusion and encouragement would be given to associations of malefactors secret or otherwise

1 **'Murder'** —See s 300 *infra* Murder in this section does not include *abetment of murder punishable under s 109* Where *a confessional statement* by the wife charged with abetment of murder alleged that she held her husband s legs while another struck him with an axe but that she protested against the murder and only assisted because such other person threatened to kill her also

[1] *Kuli Lyatara Bomma*, [191?] M W N 1108 [2] History of Crim Law, Vol II p 10?

is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by clause 72 (this section) a protection very similar to that which we have given to the acts of regular guardians"[1].

The following illustrations[2] further elucidate the meaning of the section:—

(1) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

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Where the accused, a man of education and wealth and living in a town where medical attendance could be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in a cruel way, it was held that he could not be said to have acted with due care and attention and was guilty of an offence under s. 314[3].

3. **'Consent'.**—See s. 90, *supra*.

4. **'Grievous hurt'.**—See s. 320, *infra*.

5. **'Hurt'.**—See s. 319, *infra*. Section 89 provides for 'grievous hurt' in a similar case.

6. **'Pecuniary benefit'.**—The explanation to this section, coupled with s. 88, does not justify the performing of a dangerous surgical operation by an unskilled person, although it was not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitting to it[4].

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ILLUSTRATION.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

COMMENT.

This section is introduced to protect the innocent without unduly cloaking the guilty. It requires that communication should have been made (1) in good faith, and (2) for the benefit of the person to whom it is made. The illustration speaks of the case of a surgeon. Very often a timely warning to the patient of his approaching death is necessary in order that he may be able to arrange his affairs to his own satisfaction. In such a case the doctor will be protected under this section if the patient dies of the shock resulting from the communication.

1. **'Good faith'.**—See s. 52, *supra*.

1 Note B, p. 109.
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Act to which a person is compelled by threats

Explanation 1 —A person who, of his own accord, or by reason of a threat of being beaten joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law

Explanation 2 —A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception

COMMENT.

The Indian law about compulsion and necessity as a justification of an act otherwise criminal is based on the law of England By this section a person is excused from the consequences of any act, except (1) murder[1] and (2) offences against the State punishable with death, done under fear of instant death Fear of hurt or even of grievous hurt is not a sufficient justification In English law fear of grievous hurt is a good justification

Object —Stephen[3] says Criminal law is itself a system of [illegible] on the widest scale It is a collection of threats of injury to life, [illegible], and property if people do commit crimes Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a [illegible] to commit murder, If you do it I will hang you Is the law to withdraw [illegible] threat if some one else says If you do not do it I will shoot you?

Surely it is at the moment when temptation to crime [illegible] the law should speak most clearly and emphatically to the [illegible] It [illegible] course a misfortune for a man that he should be placed between [illegible], but would be a much greater misfortune for society at large if [illegible] could [illegible] impunity upon their agents by threatening them with death [illegible] if [illegible] refused to execute their commands If impunity could be [illegible] would be opened to collusion and encouragement would [illegible] of malefactors secret or otherwise'

1 **'Murder'** —See s 300 *infra* 'Murder' in [illegible] abetment of murder punishable under s 109 [illegible] by the wife, charged with abetment of murder, [illegible] legs while another struck him with an axe, [illegible] murder and only assisted because such other [illegible]

[1] *Kallkyatara Bomma* [1912] M W N 1108 [2] [illegible]

it was held that the omission of the Judge to direct the jury that, if they believed the statement, she could not, having regard to this section, be convicted of abetment of murder under s. 109, was a misdirection vitiating the conviction[1].

2. **'Offences against the State'.**—See s. 121, *infra*, for offences agains the State punishable with death.

3. **'Instant death'.**—There must be reasonable fear, at the very time, of instant death. Persons who do criminal acts from fear of anything but instant death do them at their peril[2]. Persons who had offered or given bribes to certain officials in the Revenue Department of the Government in order to avoid pecuniary injury or personal molestation were not protected by this section[3]. Mere menace of future death will not be sufficient. Where certain witnesses gave false evidence, and then pleaded that they were coerced to do so by a Police Inspector, it was held that they were guilty as there was no proof of instant death[4]. A policeman stood by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession. He was bound under the Bombay District Police Act (IV of 1890) to arrest persons committing assaults likely to cause grievous bodily injury but he did not. It was held that nothing but fear of instant death was a defence for a policeman who tortured any one by orders of his superior[5].

Doctrine of compulsion and necessity.—"No one can plead the excuse of necessity or compulsion as a defence of an act otherwise penal, except as provided in s. 94....Lord Hale argues that our law is better than that laid down by the Jesuitical Casuists of France, in this respect, as it prevents aggrieved persons pretending to judge their own cause, and then proceeding to illegal means of redress, as when servants, judging themselves in want of clothes or victuals, get them by robbing their masters[6]. Mr. Branson cited *McGrowther's Case*,[7] as showing how any other rule would make crime triumphant. Where some prisoners pleaded that in 1746 they joined the Duke of Perth in arms against the king, because they feared that their houses would be burned and their goods spoiled, all the Judges concurred that the prisoners were rightly convicted; and Sir M. Foster points out that if threats of this kind were an excuse, it would be in the power of any leader of a rebellion to indemnify all his followers. The same consideration applies to people who bribe public officers: a crime more common here than high treason. If the law allowed the bribers to escape criminal liability....by pleading and proving that they were put in fear of some pecuniary injury or some stoppage of promotion, that would be tantamount to encouraging the corruption, as the corrupt Judge or Officer would then be able by a politic use of threats to give an indemnity to all who paid him money...in dealing with the question of guilty or not, the law does not, where there is no fear of instant death, require the Courts to discuss the philosophy of free will, or determine whether the person who bribes to secure some advantage to himself is a victim of extortion, or feels helpless or not"[8]. "No man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind"[9].

The same learned Judge in another Bombay case[10] remarks: "All our training as judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts...Except where unsoundness of mind is proved, or real fear of instant death is proved, the burden being

1 *Umadasi Dasi*, (1924) 52 Cal. 112.
2 *Maganlal*, (1889) 14 Bom. 115, 131, 132.
3 *Ibid.*
4 *Sonoo*, (1868) 10 W. R. (Cr.) 48.
5 *Latifkhan*, (1895) 20 Bom. 394.
6 1 Hale P. C. 51.
7 (1746) 18 St. Tr. 391, Foster's C. L. 13, 18.
8 Per Jardine, J., in *Maganlal*, (1889) 14 Bom. 115, pp. 131, 133, 134, 135.
9 *Tyler*, (1838) 8 C. & P. 616. 620.
10 *Devji Govindji*, (1895) 20 Bom. 215, 222, 223.

on the prisoner, the pressure of temptation is not an excuse for breaking the law Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics—of sitting as did the fallen angels reasoning high of

> 'Providence, foreknowledge, will and fate
> Fixed fate, free will, foreknowledge absolute,
> And found no end in wandering mazes lost' "

See also the remarks of Lord Coleridge in *R* v *Dudley*[1] (vide cases under s 81, *sup*)

English law.—The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide The fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels[2] A person is excused, under certain conditions, if he is forced to levy war against the King or to adhere to the King's enemies provided he uses every reasonable endeavour to resist or escape[3] According to English law a married woman charged with the

unless it appear that she did not so act There is no provision in favour of the wife under such circumstances in the Penal Code

PRACTICE.

Procedure.—Punishment—The moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment[4].

Act causing slight harm

95 Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper[1] would complain of such harm.

COMMENT.

The maxim *de minimis non curat lex* (the law does not take account of trifles) is the foundation of this section

Object.—The authors of the Code observe "Clause 73 (this section) is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, and assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the judges

1 (1884) 14 Q B D 273
2 *MacGrowther's* case, (1746) Foster 13, 18, 18 St Tr 391, 393
3 7th Parl Rep, 73
4 Stephen's History of Crim. Law, Vol. II. p 107

to except them in practice; for if the Code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning"[1].

Scope.—This section has no application, unless the act in question amounts to an offence under the Code, but for the operation of this section. Where the accused who was ordered by his employers in Calcutta to take certain bags of papers and forms belonging to them to their yard to burn and destroy them, instead of doing that took them to a place for sale, it was held that his act did not amount to criminal breach of trust and that this section had therefore no application[2]. The section has no application where the act charged against the accused person amounts to an offence irrespectively of whether he thereby caused, intended to cause, or knew himself to be likely to cause, harm. The accused was arrested under s. 131 of the Railways Act for being found in a state of intoxication on a railway station. The Magistrate discharged him on the ground that the harm done was so slight that "no notice would be taken of it under s. 95 of the Indian Penal Code beyond a mere warning." It was held, on revision, that the accused should have been convicted because to be drunk upon any part of a railway was to commit an offence under s. 120A of the Railways Act, and the fact that he caused little or no annoyance to any one in particular could not exempt him from conviction under that section[3].

This section leaves unaffected the Madras Regulations (XI of 1816, s. 10, and IV of 1821, s. 6) as to trivial offences.

1. **'Person of ordinary sense and temper'.**—Such person must be taken from the class to which the complainant belongs.

CASES.

Acts causing slight harm.—Where a person took pods, almost valueless, from a tree standing on Government waste land[4]; where a person complained of the harm caused to his reputation by the imputation that he was travelling with a wrong ticket[5]; where a young woman, of questionable character, was going through a public thoroughfare to fetch water, and the accused caught hold of her hand, as a mere piece of foolish and vulgar chaff[6]; where the accused was convicted of mischief for taking some earth of hardly any appreciable value from an open piece of ground[7]; where a person removed a semi-decayed branch of a tamarind tree not belonging to him, and overhanging the roof of his house, because it inconvenienced him[8]; where a barrister and a pleader were engaged in a case, and the latter made a remark conveying an imputation on the former upon which the former called the latter a "liar"[9]; where two parties collected outside their respective houses and apparently challenged each other, but nothing happened[10]; where a pleader said to the pleader of the opposite party that the status of a witness who received Rs. 10 to Rs. 15 a month was higher than his[11]; where a person killed a goat by *jhatka* process and exposed its flesh for sale in the presence of Mahomedans so as to insult them[12]; where a pleader

1 Note B, pp. 109, 110.

2 *Preo Nath Chowdhry*, (1902) 29 Cal. 489. See *Wilkinson*, (1898) 2 C. W. N. 216.

3 *John Scott*, (1905) 1 N. L. R. 139.

4 *Kasya bin Ravji*, (1868) 5 B. H. C. (Cr. C.) 35. To the same effect is *Mahomed Khan*, (1894) 8 C. P. L. R. (Cr.) 15, where a few branches of no appreciable value were cut off from a tree.

5 *South Indian Railway Co.* v. *Ramakrishna*, (1889) 13 Mad. 34.

6 *Bhairon Misr*, (1887) 7 A. W. N. 73.

7 *Gulzari Lal*, (1882) 2 A. W. N. 229.

8 *Jiwa Ram*, (1888) 8 A. W. N. 100; *Mahomed Khan*, sup.

9 *Vansittart*, (1883) 3 A. W. N. 46; *Amir Hasan*, (1883) 3 A. W. N. 167.

10 *Parma Singh*, (1911) 12 Cr. L. J. 103.

11 *Sharif Ahmad* v. *Qabul Singh*, (1921) 43 All. 497, 502.

12 *Kirpa Singh*, (1912) P. W. R. (Cr.) No. 26 of 1912.

said *halkat bhanchod* to a person who insisted on sitting in the Pleaders' Room after he was pushed out of it[1], and where the wc ... akin to an abuse or an insult than to defamation of character[2], ...

A Deputy Magistrate went to a pla ... y the residents for funds to enable them to ... s- sion with the people assembled, he remar ... re well to do men, they must make the well themselves, whereupon the accused who were present there said to the Deputy Magistrate. "Then why do you make an enquiry, go away quietly" It was held that the accused were not guilty of any offence as their statement came within the purview of this section[3]

Acts causing serious harm.—Where a blow was given across the chest ... Superintendent of Police

was charged with the offence of ... and mangoes[5], where a respectable man was taken by the ear[7], where a man of low caste insti ... for defamation on his being falsely charged with theft[8], where ... i e, prostitute's son in a book published by t ... the time of a feast of his brotherhood declared that the complainant had been outcasted and was not fit to sit down at the feast with the other members of the brotherhood[10], or where the accused used the words "*go to hell*" to a person after an altercation with him[11], this section was held to be not applicable

PRACTICE

The Central Provinces Circular.—Magistrates should also bear in mind the provisions of s 95 of the Indian Penal Code and apply them reasonably to the complaints before them, with reference to the position in life of the parties concerned, and the habits of the class to which they belong[12]

Of the Right of Private Defence.

Things done in private defence

96 Nothing is an offence which is done in the exercise of the right of private defence.

COMMENT

Object.—*The authors of the Code say* "*We propose to except from* the operation of the penal clauses of the Code large classes of acts done in good ... aggressions In this part of the chapter ... actness as the subject appears to ... defence It may be thought that

[1] *Moro Balvant Marathe*, (1913) 15 Bom L R 1039

[2] *Jasraj Jagga* (1928) 30 Cr L J 379.

[3] *Jaykrishna Somanta*, (1916) 21 C W N 95

[4] *Govt of Bengal v Sheo Gholam Lalla*, (1875) 24 W R (Cr) 67

[5] *Ramasami*, (1888) 12 Mad 148 See *Maula Bakhsh*, (1904) 27 All 28, *Kashi Nath Naek*, (1897) 25 Cal 207

[6] *Ranchore*, (1888) Cr R No 61 of 1888, Unrep. Cr C 400

[7] *Shoshi Bhusan Mukerjee v Walmsley*, (1897) 1 C. W N cxxxxiv

[8] *Nobin Dome*, (1865) 2 W R (Cr) 35

[9] *Ramanuja Chariar v Prathivathi Bayan Karam*, [1911] 2 M. W N 8

[10] *Mohan Lal v Ram Charan*, (1928) 29 Cr L J 451

... Dalal (1927) Crim Revn ... Mirza, ...

we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits"[1].

This right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men[2].

Scope.—There is no right of private defence under the Code against any act which is not in itself an offence under it[3]. The defence of possession either of goods or lands against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace.

Limitations.—The right is subject in all cases to the restriction contained in cls. 3 and 4 of s. 99[4].

Aggression.—*This right cannot be pleaded by persons who, believing they will be attacked, court the attack*[5].

PRACTICE.

Whether the right of defence should be pleaded.—The accused must plead the right of defence. It is for those who raise this plea to prove it If raised, a full account of the occurrence must be given in evidence[6]. Because it is necessary that all the circumstances should be pleaded before a Court and the plea ought to be proved by satisfactory evidence[7]. In a case the Allahabad High Court held that a Court ought not to set up such a plea when the accused himself has not done so[8]. Subsequently it has held that even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of the fact[9]. The Madras High Court has ruled that even if the accused does not specifically plead private defence, he may be acquitted if the evidence showed that he was acting in self-defence[10]. Woodroffe, J., has observed in a full bench decision of the Calcutta High Court that "it cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. If such a case arises on the

1 Note B, p. 110.
2 Bentham.
3 *Ganouri Lal Das*, (1889) 16 Cal. 206, 218.
4 *Josef Casorati*, (1879) P. R. No. 36 of 1879.
5 *Nowabdee*, (1864) W. R. (Gap. No.) (Cr.) 11.
6 *Jamsheer Sirdar*, (1877) 1 C. L. R. 62; *In re Kali Churn Mookerjee*, (1882) 11 C. L. R. 232.
7 *Fatehali*, (1909) Crim. Rev. Application No. 222 of 1909, Unrep. (Bom.)
8 *Gullu*, (1904) 24 A. W. N. 113.
9 *Kishen Lal*, (1924) 22 A. L. J. 501.
10 *Veerana Nadan*, [1912] M. W. N. 404; *Pachai Gounden*, (1914) 15 Cr. L. J. 710.

prosecution evidence, it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel"[1] Similarly, the Lahore High Court has held that when there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence the Court may not ignore that evidence and convict the accused merely because the latter set up a different defence and denied having committed the assault[2]

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law An accused can set up an alternative inconsistent defence[3]

An accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence cannot in appeal set up a case, founded upon the evidence taken at his trial that he acted in the exercise of the right of private defence, neither is the Court competent to raise such a plea on his behalf[4]

Right of private defence of the body and of property

97 Every person has a right, subject to the restrictions contained in section 99, to defend—

First —His own body and the body of any other person[1], against any offence affecting the human body,

Secondly.—The property, whether moveable or immoveable, of himself or of any other person[2], against any act which is an offence falling under the definition of theft[3], robbery[4], mischief[5] or criminal trespass[6], or which is an attempt[7] to commit theft, robbery, mischief or criminal trespass

COMMENT.

This section says what the extent of the right of defence is Section 99 speaks of the limitations on the exercise of this right

Scope —*This section is much wider than the English law* Under it even a stranger may defend the person or property of another person, whereas under the English law there must be some kind of relationship existing, such as that of master and servant or husband and wife or guardian and ward, before this right could be exercised on behalf of another Under the English law a person has *no right to commit an assault merely in defence of other persons*

As to the defence of property the section speaks of "theft and robbery" but not offences like "house breaking" and "dacoity" It, therefore, seems that the mention of "theft" must be taken to include all offences *ejusdem generis* The same consideration applies to the mention of "mischief and "criminal trespass"

1. 'Any other person'.—"It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong It is a noble movement which makes us forget our own danger at the first cry of distress It concerns the public safety that every honest man should consider himself as *the natural protector of every other*'[5] *The section embodies this principle* and it provides that every person has a right to defend his body or the body of any other person

[1] *Upendra Nath Das* (1914) 19 C. W N 653, F B , *Afiruddi Chokidar* (1919) 29 C L. J 571

Ghulam Rasul, (1921) 3 L. L. J 284

[2] *Yusuf Husain* (1916) 40 All. 284, *Fauda Kaur*, (1919) 1 P L. T 79

[4] *Timmal*, (1898) 21 All 122

[5] Bentham

A full bench of the Madras High Court has laid down that the right of private defence as laid down in ss. 96 to 105 enables the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted (e.g., drunkenness), when the person arresting or confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Where, therefore, a village Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that he was not guilty of any offence[1].

Defence of person.—Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, both were held to have committed no offence[2].

Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place, in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party were protected by this section[3]. On being falsely informed that certain stolen property was in the possession of one P, a Sub-Inspector proceeded with a constable to P's house with the object of making a search. On his arrival, he demanded the said property from P's wife. She repudiated all knowledge of it and told him that her husband would be back shortly. He, however, declined to wait for P's return, but began to threaten the woman with a cane and laid hands on her. On her cries, accused (P's cousin) ran to her help. An altercation ensued and, ultimately, the accused on being assaulted by the Sub-Inspector and the constable, snatched a heavy stick from the latter and struck two blows on the forehead of the Sub-Inspector which proved fatal. It was held that the accused had a right of self-defence against the dual assault on his person[4]. Where *lathi* (club) blows were showered upon a person, it was held that he was justified in striking his adversaries with a spear[5].

English case.—Under circumstances which might have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father. It was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable[6].

2. 'Moveable or immoveable property, of himself or of any other person'.—The right of private defence of property extends not only to one's own property but also to the property of any other person. It is not necessary that one of the offences enumerated in the section should have been actually committed, it is enough if there is an attempt to commit any of those offences[7]. A party in possession of land is legally entitled to defend his possession against another party seeking to eject him by force[8]; or to steal from it[9]; or to do an act which will have the effect of causing injury to it, e.g., by cutting a bund[10]. It is immaterial whether the person in possession of the property had or had not the right to possession. If a zemindar's people enter upon crops with the intention of distraining without notice, the ryot owners are justified in considering such action as trespass[11]. But mere persistence in demanding rent will not amount

1 *Gopal Naidu*, (1922) 46 Mad. 605, F.B.; *Mani Karki*, (1926) 28 Cr. L. J. 445.
2 *Dhaumun Teli*, (1873) 20 W. R. (Cr.) 36.
3 *Nareshi Singh*, (1923) 2 Pat. 595.
4 *Param Sukh*, (1925) 23 A. L. J. 1037.
5 *Surain Singh*, (1928) 29 Cr. L. J. 755.
6 *Rose*, (1884) 15 Cox 540.
7 *Dalganjan*, (1923) 25 Cr. L. J. 481
8 *Sachee Boler*, (1867) 7 W. R. (Cr.) 76; *Tulsi Sing*, (1868) 2 Beng. L. R. 16, 10 W. R. (Cr.) 64; *Gooroo Churn Chung*, (1870) 14 W. R. (Cr.) 69; *Tulsie*, (1925) 26 P. L. R. 487.
9 *Mokee*, (1869) 12 W. R. (Cr.) 15.
10 *Birjoo Singh* v. *Khub Lall*, (1873) 19 W. R. (Cr.) 66; *Shunker Singh* v. *Burmah Mahto*, (1875) 23 W. R. (Cr.) 25; *Ganouri Lal Das*, (1889) 16 Cal. 206.
11 *Kanhai Shahu*, (1875) 23 W. R. (Cr.) 40.

to trespass so as to justify an assault on the person making the demand[1] A landlord who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad Act VIII of 1865) distrained his cattle for arrears of rent, the assistance of the police having been procured for the purpose The tenant, with the assistance of seven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards It was held that the tenants were not entitled to the right of defence and were guilty of rioting[2]

In order to establish the right of private defence of property it is not necessary for the accused to prove his possession affirmatively, he can rely on the presumption of continuance of possession arising in his favour from the circumstances of the case[3]

When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right Persons exercising their lawful rights are not members of an unlawful assembly nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence In such a case each is liable only for his individual acts done in excess of such right[4]

3 **'Theft'** —See s 378, *infra* Where a number of persons were justified in resisting the theft of their crops they could not all be considered as members of an unlawful assembly with the common object of asserting a right to the land on which the crops stood, because some of their number exceeded the right of private defence But, if after some of them had exceeded the right of private defence, others continued in the assembly aiding and abetting them, they could all be considered members of an unlawful assembly[5]

4 **'Robbery'.**—See s 390, *infra*

5 **'Mischief'.**—See s 425, *infra*

6 **'Criminal trespass'** —See s 441, *infra* A rightful owner is entitled to physically turn out a trespasser or one trying to infringe upon his rights A person exercising this right should, however, not use more force than is reasonable to defend his possession from a trespasser[6] A person in possession of lands is,
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so as to be guilty of *a breach of the peace*, it is more than a trespass So, if a man with force invades and enters into the *dwelling* of another But a man is not authorized to fire a pistol on every intrusion or invasion of his house He ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity But, the making an attack upon a dwelling and especially *at night*, the law regards as equivalent to an *assault* on a man's person; for a man s house is his castle, and therefore, in the eye of the law, it is equivalent to an assault, but no *words* or *singing* are equivalent to an assault, nor will they authorize an assault in return' [8]

The auction purchaser does not commit any criminal act in going to assert his title and to take possession of the property purchased by him by ousting the judgment debtor, who became a trespasser after the date of delivery of possession[9].

1 *Mahomed Jan v Khadi Sheik*, (1871) 16 W R. (Cr) 65 (75).

2 *Ramayya* (1889) 13 Mad 148

3 *Jainath*, (1926) 28 Cr L J 303

4 *Kunja Bhuiya* (1912) 39 Cal 806, *Ambika Singh*, (1921) 1 Pat 212.

5 *Baijnath Dhanuk* (1908) 36 Cal 296

6 *Ram Krishna Singh* (1922) 3 P. L. T 335.

7 *Shurufooddin v Kassinath*, (1870) 13 W R (Cr) 64

8 *Meade* (1823) 1 Lewin 184 185

9 *Ram Krishna Singh*, (1922) 3 P L T 335

Where the common intention of an assembly of more than five persons was to resist by force an unlawful trespass on land it was held that they were not guilty of rioting[1].

7. 'Attempt'.—See s. 511, *infra*.

Defence of property.—**Plea allowed.**—The villagers belonging to C walked in a religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructers and hurt to two others of them. It was held that they were justified in exercising their right of private defence of body and property and the harm inflicted was not more than necessary for the purpose of self-defence[2]. Where persons, who actually grew the disputed crop and who were no parties either to the civil suit for possession which was decreed against their landlord, or to the delivery of possession of the land, resisted the action of the complainant who went to take possession under the decree of the civil Court, it was held that they were justified in claiming what they had grown and in resisting the complainant[3]. Where cattle belonging to the complainant trespassed on to the land of the accused, who seized the cattle and were driving them to the pound when the complainant's party arrived and attempted to rescue the cattle from the accused and in doing so the complainant's party used violence and succeeded in rescuing some of the cattle, and thereupon the accused resisted the action of the complainant's party and in attempting to defend themselves against the violence used by the complainant's party, caused injuries to several members of that party, some of which amounted to grievous hurt, it was held that the accused were legally entitled to take the cattle to the pound and that the action of the complainant's party in attempting to rescue the cattle was unlawful and that the accused had, therefore, the right of private defence, against the acts of the complainant's party and where it could not be said under the circumstances that the accused had exceeded that right they were not guilty of any offence[4].

Criminal trespass.—A police-officer attempted to carry on a general search for stolen property (not authorized by law). One of the accused in resisting such a search pushed the Sub-Inspector and the latter ordered two constables to climb on his roof and break into the house, whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house and this empty threat was sufficient to prevent the police from committing the trespass. It was held that the accused were justified in resisting the search, and they had not exceeded the right of private defence[5].

Plea disallowed.—Accused was out in the jungles with his gun; an altercation took place between him and the deceased, the former interfering to prevent the latter from committing real or supposed cattle trespass; the deceased thereupon with a large club attacked the accused, who fired without any particular aim, but lowering the muzzle of the gun so as not to hit a vital part, and death immediately resulted from the wound thus inflicted. It was held that the accused's act was not a legal exercise of the right of private defence as he had only to stand back and he was safe[6].

Altercation between two parties.—Party A sowed a crop in a field to which apparently they were entitled. Party B, claiming the field and the crop as theirs,

1 *Kalee Mundle,* (1880) 10 C. L. R. 278; *Guru Charan Chang,* (1870) 6 Beng. L. R. App. 9; *Toolsee Singh,* (1868) 10 W. R. (Cr.) 64.

2 *Regula Bheemappa,* (1902) 26 Mad. 249.

3 *Gajendra Ghorai,* (1911) 15 C. L. J. 80.

4 *Udit Singh,* (1925) 6 P. L. T. 838.

5 *Prankhang,* (1912) 16 C. W. N. 1078.

6 *Kureem Buksh,* (1867) P. R. No. 13 of 1868. See to the same effect, *Gurdit Singh,* (1872) P. R. No. 12 of 1872.

entered upon the land and began to cut the crop Party A having watched party B enter upon the land, took counsel together and then proceeded to attack party B and a fight ensued in which grievous hurt was caused It was held that it was not open to party A to plead that they were acting in the exercise of their right of private defence of property[1] This case does not lay down sound law The finding of possession and sowing of the crops on the part of A brings the case under this section subject to s 99 The taking of counsel before action will not by itself deprive the accused of his right of private defence It is not found that there was time to have recourse to the authorities This case is not supported by *Q E* v *Prag Dat*[2] though it professes to follow that case, and is directly in conflict with *Q E* v *Narsang Pathabhai*[3] *Pachkauri* v *Q E*[4] and *K E* v *Ayya Annasamy Aiyar*[5] and has not been referred to in *Emp* v *Hira*[6] In the last case certain persons who were lawfully in possession as tenants of agricultural land having reason to suppose that it was possible that they might be attacked and ejected from the land by force made a practice of keeping their clubs in readiness and also persuaded the tenants of some adjacent fields to do likewise The expected attack came and there was a somewhat severe fight in the course of which both parties were injured It was held that the defenders were within their rights in holding themselves in readiness to repel an attack if and when it should come

The accused went with three ploughs on the land to which the complainant had the right of possession and of which he was in possession till such entry, and began to plough up the land to uproot some castor plants and throw them away While they were thus in actual but temporary occupation the complainant and his party went on the land and tried to unyoke the cattle whereupon a riot took place It was held that the accused were not justified on entering on the land in ploughing it uprooting the plants and throwing them away that they were members of an unlawful assembly the common object of which was to

vere prepared to

was not justified

PRACTICE

Burden of proof —The burden of proof is upon the accused to justify his plea of right of private defence and in the case of right of private defence of property, he must prove that it was his property[8]

A mere statement by the accused that the other party wounded them is not

the blow in question[9]

98 When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth[1], the want of maturity of understanding,[2] the unsoundness of mind[3], or the intoxication[4] of the person doing that act, or by reason of any misconception[5] on the part of that person, every person has the

Right of private defence against the act of a person of unsound mind etc

[1] Kalyı (1901) 24 All 143 *Kadhu Singh* (1902) 24 All 298 lays down the same principle on similar facts Followed in *Jaipal* (1915) 17 Cr L J 180

[2] (1898) 20 All 459

[3] (1890) 14 Bom 441

[4] (189) 24 Cal 68

[5] (1901) 25 Mad. 624

same right of private defence against that act which he would have if the act were that offence.

ILLUSTRATIONS.

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

COMMENT.

This section lays down that for the purpose of exercising the right of private defence physical or mental incapacity of the person against whom the right is exercised is no bar.

1. **'Youth'.**—See ss. 82-83, *supra*.
2. **'Want of maturity of understanding'.**—See s. 83, *supra*.
3. **'Unsoundness of mind'.**—See s. 84, *supra*.
4. **'Intoxication'.**—See s. 85, *supra*.
5. **'Misconception'.**—See ss. 76-79, *supra*.

Acts against which there is no right of private defence.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law[1].

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law[2].

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities[3].

Extent to which the right may be exercised.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence[4].

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such

direction, or unless such person states the authority under which he acts or, if he has authority in writing, unless he produces such authority, if demanded.

COMMENT

This section enumerates the limitations put on the exercise of the right of defence

1. **First clause** —This clause applies to those cases in which the public servant is acting (1) in good faith and (2) under colour of his office, though the particular act being done by him may not be justifiable by law

This clause was enacted to meet cases which would not fall within s 332 by reason of the public servant in s 332 not being at the time when the assault was committed ed on him by law It applie to those cases n in good faith under colour of his office, thoug him may not be justifiable by law[1].

'An act which does not reasonably cause the apprehension of death or of grievous hurt' —The right of private defence against an injury apprehended to be done by a public servant extends only to those cases in which there is a reasonable cause of apprehension of death or of grievous hurt being caused by the act of such public servant[2] An Excise Inspector pursued an armed smuggler, and on coming up with him ordered him to stop and fired his revolver twice to frighten him, whereupon the smuggler drew a sword and cut the Inspector on the thigh It was held that the smuggler had reasonable ground for believing that the Inspector intended to cause death or grievous hurt and did not exceed the right of private defence[3]

'Grievous hurt', see s 320, *infra*

'Public servant', see s 21 *supra*

'Good faith', see s 52, *supra*[4]

'Under colour of his office' —The protection is intended to be given only to a public servant acting honestly in the legitimate discharge of powers conferred or of duties imposed upon him

'Not strictly justifiable by law' —This section has no application to a case where the initial proceeding and the power under which any public servant purports to act are altogether without jurisdiction[5] and entirely *ultra vires*[6] But the

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1 *Dal p* (1890) 18 All 246, 252
2 *Ranjha* (1927) 9 L L J 424
3 *Nga Nan Da* (1919) 3 U B R 176,

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78 See *Bhola Mahto* (1904) 9 C W N 125,

9 *Musammat Hafi an Bibi* v *Musammat Suba Bibi* (1929) 27 C W N 854 *Allah Dad* (1923) 25 Cr L J 43 But see *Thaba Singh* (102) 28 Cr L J 972

10 *Prankhang* (1912) 16 C W N 1076 *Government of Assam* v *Sahebul a* (1923) 27 C W N 857 F B

Cases.—Resistance to an officer acting without a warrant.—A police-officer attempted without a search-warrant to enter into a house in search of property alleged to have been stolen and was obstructed and resisted. It was held that, even though the officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice[1].

Resistance to illegal search.—A riot took place while a police-officer was searching the house of one of the accused outside the police-officer's limits. In the course of the riot the police-officer and his party were beaten, the property already attached by him was lost, and a person arrested by him disappeared. The object of the riot was to prevent the search, and not the taking of the property or the release of the prisoner. It was held that the police-officer having made the search in good faith and under colour of his office, the accused could not plead a right of private defence and that, if they had any such right, they had exceeded it and were guilty of offences of riot and hurt[2].

Resistance to an officer acting on an illegal warrant or order or acting illegally.—Where, on the complaint of one G that his wife was wrongfully confined by his father-in-law, a warrant was issued under s. 96, Criminal Procedure Code, and the police-officer, attempting to execute this warrant at the house of the father-in-law, was obstructed by him and seven others who used criminal force, it was held that, as the warrant issued was wholly illegal, the accused were not deprived of the right of defence[3]. Where the accused was convicted of having assaulted a peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ, it was held that whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the accused had no right of private defence against the peon who was a public servant acting under colour of his office in good faith[4]. Where an income-tax officer having entered the accused's factory for examination of their accounts refused to leave it and sent for a police-officer on their refusal to show him their accounts and was therefore forcibly ejected by them, it was held that this section did not deprive the accused of their right of private defence as the proceedings of the officer were wholly illegal and he was not acting in good faith under colour of his office[5]. A police-officer, finding one of the accused at night time carrying a long-handled hatchet, and suspecting him to be on his way to kill a certain person with whom he had enmity, demanded the hatchet and on refusal attempted to snatch it from the accused. The latter called to others an the police-officer was assaulted by three men, grievous hurt being inflicted upon him. It was held that a hatchet not being a weapon the possession of which without a license is forbidden by law, the action of the police-officer was wholly without jurisdiction and therefore this section was not applicable[6]. Where certain peons forcibly seized for military purposes a bullock cart not let on hire, and a scuffle ensued and one of the peons was hurt by the cartman, it was held that the latter acted in the exercise of his right of private defence, because the peons had no legal authority to take the cart in their charge by criminal force and without his consent and thus their act being one not done under colour of their office, this section did not apply[7].

1 *Vyankatrav Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Pukot Kotu*, (1896) 19 Mad. 349; *Attar Singh*, (1917) P. L. R. No. 57 of 1918.

2 *Mir Shah Nawaz Khan*, (1913) 8 S. L. R. 1; *Ram Harakh*, (1907) 15 Cr. L. J. 436.

3 *Bisu Haldar*, (1907) 11 C. W. N. 836, 6 C. L. J. 127.

4 *Preo Lal Mukerjee*, (1913) 18 C. W. N. 548.

5 *Achhru Ram*, (1926) 7 Lah. 104.

6 *Haq Dad*, (1925) 6 Lah. 392.

7 *Parshadi Pasi* v. *Baljit Singh*, (1913) 14 Cr. L. J. 409. Resistance to illegal impressment is justifiable: *Pancham*, (1919) 20 Cr. L. J. 727.

Illegal attachment—Where articles protected from attachment were attached, it was held that this act did not justify resistance[1] Where the property of a person was wrongfully attached as the property of certain absconders, it was held that the rightful owner had no right of private defence of his property, as the police officer was acting in good faith under colour of his office, and that even supposing the order of attachment might not have been properly made, that would

such a defence[2] This decision seems ques-
ate defence if the proceedings of a public officer
v But in this case the action of the police-officer was entirely *ultra vires* as the property in question did not belong to the absconders, and there is no room left for the operation of the first two clauses of this section See *Q E* v *Tulsiram*[3] *Jagarnath Mandhata* v *Q E*[4], and *Q E* v *Jogendra Nath Mukerje*[5]

Illegal arrest.—Where a constable effected an arrest under colour of his office, it was held that there was no right of private defence against him even though the arrest was not strictly justified by law[6]

Act done without jurisdiction—A Magistrate has no jurisdiction to issue an order under s 144, Criminal Procedure Code, in favour of any person and ask the police to allow him to cut the crops without making any inquiry as to who was in possession of the lands and the third party, whose possession is found has a right of private defence of property and that party is not deprived of that right simply because the police were there armed with an illegal and unjustifiable order of the Magistrate[7] Where moveable property was attached in execution of a civil Court decree and removed by a peon of the Court from the house of the accused contrary to certain High Court Circulars, and subsequently it was taken away by the accused, it was held that this section was not a bar to the exercise of the right of private defence of property as the removal was illegal[8]

2. Second clause—The first clause speaks of the acts done by a public servant, this clause, of acts done under the direction of a public servant Under this clause it is not necessary that the doer should be a public servant He must only act under the directions of a public servant Explanation 2 must be read conjointly with this clause Notwithstanding this clause a person can resist a public servant if the latter's conduct is altogether illegal Thus where a licensed vaccinator unlawfully attempted to take lymph from the arm of a person who objected to it, it was held that the resistance was justifiable[9]

Cases—**Resistance to the execution of a warrant**—Where a police officer attempted to execute a warrant, the issue of which was illegal, it was held that the accused were justified in their resistance[10] It was held similarly where a constable conducted a search without any authority[11] Where the warrant issued for the arrest of a debtor was initialled though not fully signed, it was held that he had no right of private defence[12]

Resistance to the execution of not a strictly legal order—An order to the police purporting to be made under s 145, Criminal Procedure Code, directing them to take charge of some crops in dispute, was not strictly legal, and in execution of such order the police went to the spot where the crop was stored and after announcing the order proposed to guard it It was held that the accused in

1 *Poomalai Udayan* (1898) 21 Mad 296
2 *Bhai Lal Chowdhry* (1902) 29 Cal 417
3 (1888) 13 Bom 168
4 (1897) 24 Cal 324
5 (1897) 24 Cal 320
6 *Munshi Singh* (1927) 29 Cr L. J 69
7 *Shaikh Moinuddin*, (1921) 2 P L. T 455
8 *Ahammad Sheikh*, (1928) 33 C. W N 174, 48 C L. J 288
9 *Jagarnath Mandhata* (1897) 24 Cal 324, *Mangobind Muchi*, (1899) 3 C. W N 627, *Bahal* (1906) 26 A. W N 98
10 *Jogendra Nath Mukerjee*, (1897) 24 Cal 320, *Biswu Haldar*, (1907) 11 C. W N 836, 6 C. L. J 127
11 *Idu Mandal*, (1907) 6 C. L. J 753
12 *Janki Prasad*, (1886) 8 All. 293.

seizing several men of the police party and carrying them off into confinement had exceeded their right of private defence[1].

3. **Third clause.**—This clause must be read with the first clause of s. 105[2]. It places an important restriction on the exercise of the right of private defence.

'Time to have recourse to the protection of the public authorities'.—No man has the right to take the law into his own hands for the protection of his person or property, if there is reasonable opportunity of redress by recourse to the public authorities. The right of self-help, when it causes or is likely to cause damage to the person or property of another person, must be restricted and recourse to the public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable[3].

There is no right of private defence where two parties arm themselves for a fight to enforce their right or supposed right, and deliberately engage in large numbers in a fight. In such a case, if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack[4]. The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is 'time to have recourse to the protection of the public authorities'. This does not mean that a person in actual possession is, when attacked, to abandon his property to the mercy of the marauders, with a view of making an application to the police for assistance[5]. The law must not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exercise the privilege of private defence as provided and restricted by the law or submit to a forcible invasion of the right of person or property in cases where, under s. 97, the law does not require any such submission[6]. At the same time the right of private defence does not take the place of the functions of those public servants who are especially charged with the protection of life and property and the apprehension of offenders, and where the assistance of the public authorities can be procured, the right cannot be lawfully exercised.

The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger actually threatened[7].

When a person is attacked while doing a lawful act, he is entitled to stand his ground and defend himself, and the law does not intend that he must run away to have recourse to the protection of the public authorities[8]. There is no obligation upon a person entitled to exercise the right of private defence and to defend his person or property, to retire merely because his assailant threatens him with violence[9].

It has been rightly said by the Madras High Court that the view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence

1 *Bhola Mahto*, (1904) 9 C. W. N. 125.

2 *Narsang Pathabhai*, (1890) 14 Bom. 441.

3 *Jairam Mahton*, (1907) 35 Cal. 103.

4 *Kabiruddin*, (1908) 35 Cal. 368; *Maniruddin*, (1908) 35 Cal. 384; *Ambika Lal*, (1908) 35 Cal. 443; *Prag Dat*, (1898) 20 All. 459; *Bechar Anop*, (1915) 17 Bom. L. R. 888, 3 Bom. Cr. C. 100; *Farman Khan*, (1926) 5 Pat. 520; *Sikandar*, (1918) 20 Cr. L. J. 83; *Madat Khan*, (1925) 27 P. L. R. 47, 7 L. L. J. 628; *Mulla*, (1925) 26 Cr. L. J. 1294; *Har Sarup*, (1925) 26 Cr. L. J. 1320.

5 *Anumantam*, (1880) 1 Weir 44; *Shamsher Khan*, (1896) 16 A. W. N. 170; *Jageshar Rai*, (1916) 15 A. L. J. 47; *Gorie Sankar*, (1917) 18 Cr. L. J. 862.

6 *Nga Hla Tun U*, (1896) P. J. L. B. 219; *Lalji Singh*, (1923) 25 Cr. L. J. 1228.

7 *Narsang Pathabhai*, (1890) 14 Bom. 441.

8 *Hafiz Ali*, (1907) 10 O. C. 196.

9 *Nareshi Singh*, (1923) 2 Pat. 559.

of the body than the law requires The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger[1] It never was intended that a man should submit to the deprivation of property in his possession without exercising any right of self-defence and trust to recover it by the tedious operation of a case in the civil Court with all the weight of possession onus of proof etc , against him[2] A rightful owner has a right to eject a trespasser from his land by civil process but it is not within his right to take a mob of men and forcibly clear the person in possession of the land in respect of which he had only title without possession The right of private defence does not cover a case of taking or retaking possession by means of criminal force or show of criminal force[3]

Cases —Time to obtain protection of public authorities —Where the servants of an indigo factory having been interfered with by the villagers to sow land went out in force to effect their purpose and the villagers also went out armed to meet them it was held that in the affray which followed neither party could plead the right of private defence of property as there was a police station near at hand[4] The accused numbering from forty to sixty armed with clubs spears and heavy billets of wood proceeded to the disputed land attacked the complainant and his father, and destroyed the crops growing thereon Both parties claimed the land as having fallen to their shares on partition The Magistrate found that the complainant was in possession and had grown the crops It was held that the right of private defence did not arise as there was no invasion of the accused s rights on the day of occurrence and in any case that they had ample time to have recourse to the authorities for the protection of their rights[5] The complainant s party consisting of twelve or thirteen persons went with pickaxes to a *bund* (embankment) erected on the land of the master of the accused in order to cut it as it obstructed the flow of water from their lands and destroyed their crops The accused hearing of this at once assembled to the number of fifty or sixty armed themselves with clubs and proceeded to the *bund* At this time the complainant s party had either finished the cutting or ceased to do so when he saw the accused approaching The latter attacked the complainant s party and drove them to their village One or more of the assailants also beat a man who was present there but was not connected with the cutting of the *bund* both in the first attack and when they returned from the chase and fractured his skull in consequence of which he died shortly after It was held that the accused were members of an unlawful assem[illegible]
numbers to enf[illegible]
became an un[illegible]
opposite party[illegible]
ed their right by attacking their opponents and chasing them and by beating the deceased[6] The accused made a combined attack upon M and R as they were throwing earth upon a narrow path of the *shamilat* and in so doing threw earth upon the fences with which the accused had formed enclosures upon the *shamilat* The injury caused to R was not serious but M died of the blow caused by one of the accused It was held that as the matter was not urgent and no serious loss of property was threatened and there was ample time to have recourse to authorities the accused who made a combined attack were guilty under ss 323 325 and 149[7]

No time to obtain protection of public authorities —The accused received information one evening that the complainants intended to go on his land on the following day, and uproot the *juwari* seed sown in it At about three o clock next

[illegible] *Mana Sing* (1867) 7 W R. (Cr) 67 [103]
[illegible] *Ram Dulal Gope* (1899) 3 C W N ccxcix
5 *Maniruddin*, (1908) 35 Cal 384
6 *Amb ka Lal*, (1908) 35 Cal 443
7 *Data Ram* (1925) [illegible] P L [illegible]

morning he was informed that the complainants had entered on his land, and were ploughing up the seed. Thereupon he at once proceeded to the spot, followed by the remaining accused, and remonstrated with the complainants, who commenced an attack on the accused. In the fight which ensued, both sides received serious injuries, and the leader of the complainant's party was killed. It was held that the complainants being the aggressors, the accused had the right of private defence; and that they were not bound to act on the information received on the previous evening, and seek the protection of the public authorities, as they had no reason to apprehend a night attack on their property[1]. Where the opponents of the accused erected some huts stealthily at night on a plot of land of which the accused were in peaceful possession and it was alleged that the opponents were in possession of the land for about fourteen hours and the accused at break of day on coming to know of this took the earliest opportunity to exercise their own right of private defence and came to the spot armed to turn out the opponents who were found by them still engaged in erecting more huts and there was a free fight between the parties and the accused did not inflict more hurt than was necessary for defending themselves, it was held that the accused were not guilty of rioting as they were entitled to their right of private defence[2]. Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place, in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party had not exceeded the right of private defence[3]. Accused received information that they were about to be attacked by a hostile section in the village. They believed that if they separated they would be pursued and attacked individually and under this belief they collected together and awaited the attack. Their enemies then appeared on the scene and one of them fired a pistol and hit one of the accused. One of the accused then fired a pistol and hit the man who had first fired, and then a fight with *lathis* commenced duing the course of which one member of each party was killed. It was held that the accused were entitled to exercise the right of private defence and it could not be said that they had exceeded that right[4].

4. **Fourth clause.**—The right of private defence is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence[5]. The amount of force necessary depends on the circumstances of the case, and there is no protection if the harm is caused by excessive violence quite unnecessary to the case[6]. For example, a person set by his master to watch a garden or yard is not at all justified in shooting at, or injuring, in any way, persons who may come into those premises, even in the night. He ought first to see whether he could not take measures for their apprehension[7]. A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited and give another a kick, it is an unjustifiable act[8]. At the same time when exercising the right of private defence, it is difficult to expect the person to weigh "with golden scales" what maximum amount of force is necessary to keep within that right[9].

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to

1 *Narsang Pathabhai*, (1890) 14 Bom. 441; *Pachkauri*, (1897) 24 Cal. 686; *Fouzdar Rai*, (1917) 4 P. L. W. 111; *Hira*, (1922) 45 All. 250.

2 *Chandulla Sheikh*, (1912) 18 C. W. N. 275.

3 *Nareshi Singh*, (1923) 2 Pat. 595; *Bega*, (1916) 18 Cr. L. J. 139.

4 *Ajodia Prasad*, (1924) 26 Cr. L. J. 997.

5 *Gobardhan Bhuyan*, (1870) 4 Beng. L. R. App. 101, sub-nom. *Gobadur Bhooyan*, (1870) 13 W. R. (Cr.) 55; *Josef Casorati*, (1879) P. R. No. 36 of 1879.

6 *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33.

7 *John Scully*, (1824) 1 C. & P. 319.

8 *Wild's* case, (1837) 2 Lewin 214.

9 *Radhey*, (1923) 24 Cr. L. J. 735.

assert a right to the disputed land and crops, because some members thereof may have exceded the right of private defence, but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right[1].

Case —Justifiable harm —Where the accused finding a thief entering
the sidewall, seized him while
to the ground to prevent his
suffocation[2], where a person
attacked by another with a spear struck a blow with a club which resulted in the death of the party attacking[3], where a boy whose crop was frequently stolen found a person stealing and gave him some blows with a club which resulted in his death[4], and where a number of armed men attacked a court house, and one of the inmates shot an assailant[5] the right of private defence was held to be a good justification

cut into bundles, whereupon the zemindar's watchmen remonstrated and a number of their men went to the spot armed with clubs and swords and a fight took place
n the course of which some
them a severe one inflicted
that the zemindar's people
had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent it was held that, inasmuch as the common object of the accused was to protect the zemindar's rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting[6] In the course of a family quarrel between a brother and sister, as to possession of a store room, the sister was roughly handled and on hearing her cry out for help, the husband who was working close by turned up and finding the wife being assaulted by her brother and another and her hands cut and bruised, struck the brother one deadly blow with an instrument and on himself being attacked by the other man, dealt another fatal blow to him also It was held that the accused had reason to suppose that his wife might be severely injured and the blows struck by him on both the men were in the exercise of the right of defence of his wife and himself[7].

More harm caused than necessary.—Where a person killed a weak old woman found stealing at night[8], where a person caught a thief in his house at night and deliberately killed him with a pickaxe to prevent his escaping[9], where the deceased attempted
him with it and I
committing house
ment when he wa
gun at persons at a distance of twenty five yards, without a reasonable appre-

1 *Baijnath Dhanuk*, (1908) 36 Cal 296,
nelsa
mad,

6 *Ram Khelawan Singh*, (1909) 36 Cal 827
7 *Bermu Chetty*, (1925) 27 Cr L J 617
8 *Gokool Bouree*, (1866) 5 W R (Cr) 33
9 *Durwan Geer*, (1866) 5 W R (Cr) 73, *Fakeera Chamar*, (1866) 6 W R (Cr) 50
10 *Fuzza Meeah* (1866) 6 W. R (Cr) 80
11 *Dhununjai Poly*, (1870) 14 W. R. (Cr) 68

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hension of danger, and injured them[1]; and where the accused armed with spears attacked and killed two persons unarmed who were ploughing a field believed by the accused to be their field[2], the right of private defence was negatived[3]. Where a body of about ten men, belonging to the decree-holder's party, went with Court officers upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof, and the drummer was assaulted by one of the latter, whereupon the accused and their party replied by an attack upon the opponents, during the course of which one of the accused's party fractured the skull of the drummer's assailant by an isolated act, but the accused continued to beat him after he had fallen helpless on the ground, it was held that the accused had a right of private defence under the circumstances, but having exceeded such right by beating the wounded man after he had fallen, they were guilty of hurt[4]. Where A trespassed on the lands of B, whose servants seized and confined A till the following day, when B gave information to the police, it was held that the conduct of B and his servants in confining A could not be supported on the ground that they were exercising the right of private defence of property[5]. The accused who was watching his field (some of the grain of which had on previous occasions been stolen) saw the deceased cutting his corn. On being pursued the deceased ran his head against a tree and fell. The accused then hit him recklessly with a stick while on the ground, and fractured his skull in two places, causing death. It was held that the right of private defence of property had been exceeded and the accused was guilty of culpable homicide[6]. The accused, five in number, went on a moonlight night, armed with clubs and assaulted two men who were cutting their rice crop, one of whom received six distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot. It was held that they were guilty of murder as they had inflicted more harm than was necessary for the purpose of defending their property[7]. Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (ironshod stick) respectively, and the rest with clubs, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some lentil crops, and attacked them, fatally wounding one and severely injuring another, it was held that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda*, had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former[8]. Where the deceased assaulted the accused and was about to hit him with clod of earth when the accused struck him two violent blows with a hatchet which he held in his hand and thereby caused his death, it was held that the accused had exceeded his right of private defence[9].

English case.—A parker finding a boy stealing wood in his master's ground bound him to his horse's tail and beat him. The horse took fright and ran away and dragged the boy on the ground till his shoulder was broken, whereof he died. This was ruled to be murder[10].

Arrest.—The English and Indian law differ somewhat on the point of arrest by, or by the direction of, public servants. Under the English law a person offering resistance to a public servant making an arrest is extenuated if the document of warrant or writ is defective in the frame of it, or if the manner of making the arrest is illegal, or if the name of the officer or party is entered without due

1 *Hussainuddy*, (1872) 17 W. R. (Cr.) 46.
2 *Gour Chand Chung*, (1872) 18 W. R. (Cr.) 29; *Natha Singh*, (1927) 28 Cr. L. J. 487.
3 See also *Abdul Hakim*, (1880) 3 All. 253; *Subba Naik*, (1898) 21 Mad. 249.
4 *Kunja Bhuiya*, (1912) 39 Cal. 896.
5 *Shurufooddin* v. *Kassinath*, (1870) 13 W. R. (Cr.) 64.
6 *Bag*, (1902) P. R. No. 29 of 1902; *Nga Tun Nyein*, (1917) 18 Cr. L. J. 284.
7 *Mammun*, (1916) P. R. No. 35 of 1916.
8 *Baijnath Dhanuk*, (1908) 36 Cal. 896.
9 *Ghulam Rasul*, (1926) 8 L. L. J. 455.
10 *Halloway*, (1628) 1 East P. C. 237, Cro. Car. 131, 1 Hale P. C. 454.

authority, but the law of India allows no extenuation on any of these accounts as long as the act is bona fide

Explanation —Actual knowledge that a person is a public servant or acting by the direction of a public servant, or reasonable ground of knowledge, as from his dress, words, weapons, etc, will deprive those against whom he acts of the right of self-defence[1]

When the right of private defence of the body extends to causing death

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death[1] or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions[2] hereinafter enumerated, namely —

First —Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence[3] of such assault,

Secondly —Such an assault as may reasonably cause the apprehension that grievous hurt[4] will otherwise be the consequence of such assault,

Thirdly —An assault with the intention of committing rape[5],

Fourthly —An assault with the intention of gratifying unnatural lust[6],

Fifthly —An assault with the intention of kidnapping[7] or abducting,

Sixthly —An assault with the intention of wrongfully confining[8] a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

COMMENT

This section justifies the killing of an assailant when apprehension of atrocious crimes enumerated in the several clauses is caused It should be read subject to the provision of s 99

The section gives the right of private defence against actual assailants It does not authorize the killing or causing of hurt to persons who may in future when reinforced by others become assailants

1. **'Voluntary causing of death'** —As to the meaning of the word 'voluntary, see s 39, *supra* The law most undoubtedly authorizes a man who is under a reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assailant either when the assault is attempted or directly threatened but the apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence It must be proportionate to and commensurate with the quality and character of the act it is intended to meet and what is done in excess is not protected[2]

[1] M & M 70

[2] Bh Walker (1882) 2 A. W N 172 *Ja pal Kunbi* (1922) 23 Cr L J 313, *Muhammad Akbar* (1922) 24 Cr L.

Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict; provided (1) that the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm; (2) that he declined further conflict, and quitted and retreated from it, so far as was practicable with safety; (3) that he killed the assailant because he had reasonable cause for believing it to be necessary so to do, in order to avoid immediate death[1].

2. **'Any of the descriptions'.**—A man is not justified in shooting another who is *about to* arrest him, when there is nothing to show that he has reason to apprehend that any of the acts mentioned in this section would ensue[2].

3. **'Reasonably cause the apprehension that death will otherwise be the consequence'.**—A man acting under an apprehension of death cannot be expected to judge too nicely the force of his own blow. He is not bound to modulate his defence step by step according to the attack, before there is reason to believe that the attack is over; he is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is justifiable[3]. Where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger[4]. Every attempt or threat to commit an offence would not, however, entitle a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution immediately, because there are many threats which people use as a form of abuse, but which are never intended to be taken seriously, and, still others, which the persons saying them have not the capacity to put into immediate execution; for it is only against a danger present and imminent that the right of private defence avails. The law will always make just allowance for the sentiments of a person placed in a situation of peril who has no time to think. His blood is then hot and his sole object is to strike a decisive blow so as to ward off the danger[5]. In the excitement and confusion of the moment it is not to be expected that an average man would weigh the means that he intends to adopt on the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack[6].

4. **'Grievous hurt'.**—See s. 320, *infra*.

5. **'Rape'.**—See s. 375, *infra*.

6. **'Unnatural lust'.**—See s. 377, *infra*.

7. **'Kidnapping'.**—See s. 359, *infra*.

8. **'Wrongfully confining'.**—See s. 340, *infra*.

CASES.

First clause.—Apprehension of death.—The accused who were two in number were being searched by an armed gang who announced their intention to kill them. The accused took refuge in a dark kitchen of a house. The mob broke into the house and two of them made their way with torches to the kitchen and attacked the accused. One of the attacking party was hacked to death by the accused. It was held that the accused had committed no offence since they were

1 10th Parl. Rep., 35.
2 *Sher Baz*, (1879) P. R. No. 1 of 1880.
3 *Bhut Nath Dome*, (1909) 13 C. W. N. 1180; *Lalji Singh*, (1923) 25 Cr. L. J. 1228.
4 *Dalip Singh*. (1922) 25 Cr. L. J. 676.
5 *Sitaram*, (1924) 26 Cr. L. J. 587.
6 *Ahmad Din*, (1926) 28 Cr. L. J. 252.

fighting for life with a murderous mob in front and an enemy who made his way into the room where they had taken refuge and it was not surprising that they did their best to make sure that their enemy was dead[1] The deceased B was on a cart when the accused K came up near it He said to K "Is that you'? and on K replying 'yes", he began using abuse and kicked K The latter then called out to the accused P, who came running up with a bottle in his hand and evidently with the intention to strike the deceased with it and he admitted that he did strike him Then B slashed at K with his *dah* first and then turned on P and slashed at him with it He hit K on the forearm and the injury caused did not turn out to be very serious But the result of the blow which hit P was that three of his fingers were cut off Then it was that K took a knife from somewhere about his person and stabbed B with it in a vital part of the body causing B s death It was held that although the deceased had turned upon P, K had the right to cause death to the deceased, if he might reasonably apprehend at the time that P s life was in danger owing to the conduct of the deceased, that a man in K s position might reasonably apprehend that the conduct of the deceased indicated an intention on his part to go on using the *dah* against them to either kill or inflict the gravest injury to his companion If the deceased had the chance of using the *dah* again on P there was a possibility and probability of P losing his life and under the circumstances the act of K in taking out the knife and stabbing the deceased was covered by this and section K did not exceed the right of self defence[2] A party of armed men escorting certain ladies met with resistance from certain persons one of whom levelled a gun against a member of the escorting party, but was stabbed to death It was held that the act of killing was done in self-defence[3] Accused who were Sikhs, abducted a Mahomedan married woman and converted her to Sikhism Nearly a year after the abduction, the relatives of the woman s husband came and demanded the return of the woman from the accused The latter refused to return her and the woman herself expressed her unwillingness to go Thereupon the husband's relatives attempted to take her away by force The accused resisted the attempt and in doing so one of them inflicted a blow on the head of one of the woman's assailants which caused the latter s death It was held that the right of the accused to defend the woman against her assailants extended under this section to the causing of death and they had therefore, committed no offence[4] The accused having got a decree against the deceased put up his house for sale in execution As nobody from the place was prepared to bid, the accused went to a neighbouring place to proclaim that a certain house had been put up for sale Deceased and another followed him, assaulted him, felled him to the ground and attempted to throttle him, whereupon the accused drew his knife and stabbed the deceased in the chest The deceased died three days after, having developed pneumonia It was held that the assault by the deceased, including an attempt by him to throttle the accused, occasioned the exercise of the right of private defence, as it was likely to cause the apprehension that death or grievous hurt would otherwise be the consequence, and that, therefore, the act of the accused was covered by the provisions of this section[5]

Second clause —Apprehension of grievous hurt—*Plea allowed* —A person rushed at the accused armed with a heavy weapon and showing every intention to assault h
of delivering
Judge held
an opportunity of running away It was held that the accused reasonably anti-

[1] *Gurlingappa Shulramappa*, (1921) 23

[3] *Ram ani* (1924) 23 A L J 68.

[4] *Nand Kishore Lal*, (1922) 23 Cr L J 609

[5] *Chhabil Das* (1922) 26 Cr L J 17

cipated grievous hurt to himself and consequently he had a right to use his spear to defend himself against the blow even to the causing of death[1]. Where the deceased, a sturdy and dissolute young man, upon a quarrel with the accused, his uncle and his uncle's son, after an exchange of abuse, snatched up a heavy *jatu* (side post of a cart) three feet long and aimed a blow with it at his uncle and possibly another at his uncle's son, and his uncle's son seized a second *jatu* two feet long, and struck the assailant twice on the head with it in consequence of which he died, it was held that there was no excess of the right of private defence and the accused had committed no offence[2].

The deceased, S, and three others, who formed his party, attacked with clubs the accused, B, and his party, three in number, as the result of a quarrel. One of the party of the deceased struck a blow on the accused which felled him to the ground. The accused rose up and inflicted a blow on the head of S, which fractured his skull causing death within a short time. It was held that under the circumstances of the case the accused did not exceed his right of private defence by inflicting the blow on the head of the deceased, as the circumstances were such as reasonably caused the apprehension that grievous hurt would, but for his action, have been the consequence of the attack that was being made upon him[3]. Where a person grew crops on a piece of land which another person cut and carried away and stacked in a field of a third party without interruption and retired from the field and then the person growing the crops came up in numbers armed with clubs and other weapons, not to commit a premeditated riot but merely to take away the crops they were entitled to and not to use any force unless they were opposed or attacked, and, while so acting within their rights in collecting their own crops with a view to take them away, they were attacked by the party of the person who had stacked the crops who were also similarly armed, first, by clods of earth and, then, with spears, it was held that the persons growing the crops had the right to defend their persons from an attack with clods and spears, an attack which reasonably causes apprehension that death would be the result, and to cause any injury short of death[4].

Where, after picking a quarrel and trying to hit the deceased, appellant ran for his safety from a subsequent attack with sticks made on him by the deceased, and after running some distance, found that he could not very well make his escape and he turned round and hit the deceased a blow and killed him, it was held that the appellant acted in self-defence and was not guilty of any offence[5].

Accused insulted the deceased and the deceased struck him with a stick. Accused retaliated by striking the deceased on the head with a *lathi*, fractured his skull and killed him. It was held that the accused had acted in the exercise of the right of private defence and could not be held to have exceeded that right[6].

Plea disallowed.—The accused had an intrigue with one S, wife of A. S and A were sleeping one night in a house about eighty paces from the place where the accused slept. In the early morning S left her cot to visit the accused. A missed her and suspecting where she had gone followed her with a hatchet. He assaulted the accused and wounded him, whereupon the accused stabbed him with a knife and killed him. It was held that as the accused had not established that voluntarily causing the death of his assailant was necessary for the purpose of defence he could not plead the right of defence[7]. Where the accused were in possession of the disputed land and the affray originated from the prosecution

1 *Nga Kyaw Zan*, (1903) 9 Burma L. R. 191. See *Nga Kyaw Dun*, (1903) 10 Burma L. R. 99.

2 *Puran*, (1904) 6 P. L. R. 49. See *Yusaf Khan*, (1919) P. W. R. No. I of 1920, 21 P. L. R. 2.

3 *Bhut Nath Dome*, (1909) 13 C. W. N. 1180.

4 *Baburam Raut*, (1912) 17 C. L. J. 394.

5 *Ram Sewak*, (1924) 23 A. L. J. 131.

6 *Imam Din*, (1924) 6 L. L. J. 525; *Pahlad*, (1923) 26 Cr. L. J. 61; *Mangal Singh*, (1924) 26 Cr. L. J. 1305, 7 L. L. J. 167; *Bishen Singh*, (1928) 11 L. L. J. 80.

7 *Hakim*, (1884) P. R. No. 41 of 1884.

arty trespassing upon it and obstructing the accused party from ploughing it was held that the accused s party was entitled to defend their land and their odies against any violence used by the prosecution party but it extended to the ight of causing death only when exercised against such an assault as might reason bly cause the apprehension that death or grievous hurt will otherwise be the result[1]

Third clause —**Rape** —Where the husband and other relations of a girl ssaulted a man while he was in the very act of violating her it was held that they ere justified under this clause[2]

PRACTICE

Evidence —Where the defence is that the party was about to commit uch a crime as would justify his death this must be proved not indeed so as to stablish the fact conclusively but so as to prove that the accused had such grounds or supposing violence was intended as would warrant a rational man in so acting nd he must prove that the offence about to be committed could not have been revented by milder means[3]

When such right xtends to causing ny harm other than eath

101 If the offence be not of any of the descriptions enumerated in the last preceding section the right of private defence of the body does not extend to the voluntary causing of death to the assailant but does extend under the restrictions mentioned n section 99, to the voluntary causing to the assailant of any harm other than death

COMMENT

Under this section any harm short of death can be inflicted in exercising he right of private defence in any case which does not fall within the provisions f the preceding section which dealt with offences in which the harm was likely o be very serious and hence justified the killing of the assailant

CASES

A dispute arose between two parties Mollahs and Shikdars Shikdars ttacked and killed one of the Mollahs who were exercising the right of retaking heir own property Three of the Shikdars were also wounded The Shikdars were convicted of culpable homicide not amounting to murder and rioting The Mollahs were held entitled to the protection conferred by this section[4] A public ervant while acting in the execution of his duties had his conveyance stopped by a number of camel drivers whose camels were trespassing on the banks of a canal belonging to Government A prisoner who had been legally arrested was forcibly escued from his po sess on He thereupon apprehending personal violence fired his gun without taking a careful aim at his assailants and wounded one of them t was held that he was protected under this section[5]

Commencement and con inuance of he right of pr vate fence of the body

102 The right of private defence of the body commences as soon as a reasonable apprehension[1] of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues as long s such apprehension of danger to the body continues

[1] *Ponthala Narsı Redd* (1914) 15 Cr L 417
[2] *Jhakri Chamar* (1912) 16 C L J 440
[3] *Josef Cavorat* (18 9) I I No 36 of 18 9
[4] *Tanoo Shikdar* (1865) 3 W R (Cr) 47
[5] *Mulery* (1900) P L No 5 of 1901 *Sardara* (1909) 11 I C 90

COMMENT.

This section indicates when the right of private defence of the body commences and till what time it continues. It commences and continues as long as danger to body lasts.

1. 'Reasonable apprehension'.—The right commences only on a reasonable apprehension of danger to the body caused by an attempt or threat to commit an offence[1]. There must be an attempt or threat, and consequent thereon an apprehension of danger; but it is not a mere idle threat, or every apprehension of a rash or timid mind, that will justify the exercise of the right. Reasonable ground *for the apprehension is requisite. Suppose the threat to proceed from a woman* or a child and to be addressed to a strong man: in such a case there would hardly be a reasonable apprehension. Present and imminent danger seems to be meant. But if a man is preparing himself, as by seizing a dangerous weapon in such a way that he manifestly intends immediate violence, this seems sufficient justification of the exercise of the right; for his conduct amounts to a threat and the other has reason to consider the danger to be imminent[2].

When danger is not present but may be avoided, can a man who voluntarily *seeks it be said to have a reasonable apprehension of such danger? As if* A knowing that B is waiting to attack and rob him, proceeds on his road with the deliberate purpose of resisting the attack with all necessary force, and does so, and thereby causes B's death. A appears to be entitled to the benefit of the exception, for he had a reasonable apprehension of danger when B attacked him, notwithstanding the attack was not unforeseen[3]. The view that a person should not exercise his right of self-defence, if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger[4]. The law does not require that a person placed in such circumstances should weigh the arguments for and against 'in golden scales'. It would be unnatural to expect him to do so, and the law in fact does not require any such thing from such person. The question to be asked is not, what a perfectly cool bystander would think absolutely necessary, but whether there was reasonable apprehension of danger to life or property on the part of the accused having regard to all the circumstances; and allowance should be made for one who with the instinct of self preservation strong upon him pursues his defence a little further than might appear to be absolutely necessary to a cool by-stander[5]. A man may justify a battery if he proves merely an assault on the part of the prosecutor, and he need not stay until the prosecutor has actually struck him; but the battery must be such only as was necessary for his defence[6].

A bare fear of any offence, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act, indicative of such an intention, will not warrant him in killing that other by way of prevention. There must be an actual danger at the time[7]. But, if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him, although it should afterwards appear that there was no such design, the act would amount to culpable homicide or even accident; according to the degree of the caution used, and the probable grounds for such belief[8].

1 *Gobardhan Bhuyan,* (1870) 4 Beng. L. R. App. 101; *Narain Das,* (1923) 3 Lah. 144.
2 M. & M. 78.
3 *Ibid,* 79.
4 *Alingal Kunhinayan,* (1905) 28 Mad. 454.
5 Per Anantakrishna Aiyar, J., in *Kuppusamier,* [1929] M. W. N. 511, 514.
6 *Deana,* (1909) 73 J. P. 255.
7 1 East P. C. 272.
8 *Ibid,* p. 273.

CASES

Reasonable apprehension.—Where the accused apprehending opposition went armed to appraise crops and on the arrival of the opposite party similarly armed did not wait till that party had attacked but proceeded to meet them and

No reasonable apprehension.—A and B met at a drinking shop and drank together On their departure A and B quarrelled about B having as A declared, caused the death of the latter's four children by incantation B admitted it, and said he would cause A to be taken by a tiger at once, at which A killed him with a club It was held that A had no reasonable apprehension of danger[2] Where the accused fired a gun at a person at a distance of twenty five yards, without a reasonable apprehension of danger and without any necessity for so doing, it was held that his act was not justifiable[3]

When the right of private defence of property extends to causing death.

103 The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :—

First.—Robbery[1] ,

Secondly.—House-breaking[2] by night;

Thirdly —Mischief[3] by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property ,

Fourthly —Theft[4], mischief or house-trespass[5], under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

COMMENT.

This section indicates when a person can be killed in defence of one's own property , s 100 indicates when a person can be killed in defence of one's body

The right extends not only when the offences enumerated in the section are committed, but also when an attempt to commit any such offences is made[4].

A distinction is observed between such offences as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the offender, and, therefore, a party would not be justified in killing another who was attempting to pick his pocket[5]

1. **'Robbery'.**—See s 390, *infra* Robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker, and if, in the

[1] *Hafiz Ali* (1907) 10 O C 196
[2] *Gobardhan Bhuyan* (1870) 4 Beng L R App 101
[3] *Hussainuddy* (1872) 17 W R (Cr) 46
[4] *Ali Mea* (1926) 43 C L J 532
[5] 1 East P C 273

course of such resistance, death is caused, it may be justified if the right of self-defence was exercised reasonably and properly, but the measure of self-defence must always be proportionate to the *quantum* of force used by the attacker and which it is necessary to repel[1].

2. **'House-breaking'.**—See s. 445, *infra*. The right of private defence of property to the extent of causing death arises not only when the house is broken into but when an attempt is made to break into the house. It is not the intention of the law that the right to defend property is available only when the thief has already effected entry, for property may be protected by attacking the thief inside the house as much as by preventing his entry into it. Where the accused was led honestly to believe that a burglar was attempting to enter his house and thus caused the death of that person, who was his own nephew, it was held that he did not exceed the right of private defence of property and had not committed any offence[2].

3. **'Mischief'.**—See s. 425, *infra*.

4. **'Theft'.**—See s. 378, *infra*.

5. **'House-trespass'.**—See s. 442, *infra*.

CASES.

Robbery.—The accused, in resisting a sudden attack made upon them by other persons for the purpose of cutting their crop, and when they had no time to complain to the police, inflicted a wound on one of them with a bamboo from the effects of which the man died. It was held that the force used, or the injuries inflicted, by the accused were not such as to exceed the right of private defence of property[3].

House-breaking.—The accused found two men close to an aperture made in his house for committing burglary. One of them made off but the other advanced to attack the accused, when the latter gave him a blow in the dark with a club, which killed him. It was held that the accused was justified in his act[4].

The accused, on being awakened in the middle of the night discovered the deceased in his courtyard, the latter having effected his entrance by scaling the wall, which surrounded it on all four sides. The court-yard, of which the small gate was locked, adjoined the room in which the accused had been sleeping, and was for practical purposes one of the rooms of the house, and an integral part of the building. In the scuffle the accused killed the deceased by striking him on the head with a club. It was held that the accused, not knowing in the dark whether the burglar was armed or not, did not exceed his right of self defence under clause 4 of this section, by striking him three times and causing his death[5].

Theft.—A thief entered the sugar plantation of the accused and began to cut sugar canes with a *da* (edged instrument). The accused on hearing the sound aimed with a cross-bow in the direction of the sound and shot. The bolt hit the thief in the side and caused his death. It was held that as the thief had the *da* with him the accused was justified in defending his property by shooting an arrow at the thief, and with a deadly weapon not actually intending to kill him, but knowing it to be likely that he would kill him, and that the accused had acted in good faith for the protection of his person and property[6].

1 *Ram Prasad Mahton*, (1919) 4 P. L. J. 289.

2 *Ali Mea*, (1926) 43 C. L. J. 532; *Dhu Ram*, [1929] A. L. J. 145.

3 *Guru Charan Chang*, (1870) 6 Beng. L. R. App. 9, 14 W. R. (Cr.) 69.

4 *Pelkoo Nushyo*, (1865) 2 W. R. (Cr.) 43; *Ram Lall Singh*, (1874) 22 W. R. (Cr.) 51.

5 *Ismail*, (1925) 6 Lah. 463.

6 *Kyaw Zan Hla*, (1904) 1 Cr. L. J. 997, 10 Burma L. R. 263.

104 If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong doer of any harm other than death.

When such right extends to causing any harm other than death

COMMENT.

Section 101 and this section restrict the right of private defence in certain cases to voluntarily causing hurt or grievous hurt. This section is connected with s 103 just as s 101 is with s 100. Thus, where the offence which occasions the [illegible] under [illegible] harm [illegible]

This section has no application by way of defence to a charge under s 504 (insult to provoke breach of the peace). The accused was taking earth from a tank whereupon the complainant having objected, the accused filthily abused him. The accused was thereupon tried for an offence under s 504 and his defence was that the tank was in his possession and belonged to him. The Magistrate held that, as the complainant had failed to prove his possession of the disputed tank the accused was justified under this section in voluntarily using abusive language. He therefore acquitted the accused. On appeal, a re trial was ordered on the ground that this section could have no application as found by the Magistrate[2]

CASES.

In an affray respecting land one of the aggressive party was killed. The accused, who were exercising the right of private defence of property, were not found guilty of culpable homicide, but were convicted of rioting. It was held that the accused, not being legally guilty of culpable homicide, were not legally [illegible] d not being rioters, or members [illegible] this section[3] Where a person [illegible], who trespassed into his house with the object of having intercourse with his wife, they were held to have committed no offence[4] Where A trespassed on the land of B, whose servant seized and confined A till the following day, when B gave information to the police, it was held that the conduct of B and his servants in confining A could not be supported on the gound that they were exercising the right of private defence of property[5] Where a police officer entered into the house of a person of suspicious character at midnight to see whether he was in the house and he was pushed out of the house by that person, it was held that the act of the police-officer in entering into the house was house trespass and that that person was justified in pushing him out[6].

1 *Goburdhun Pari* (1870) 14 W R (Cr) 74, *Narain Das* (1922) 3 Lah 144

2 *Palhal Das Roy* v *Kailash Banu*, (1909) 11 C L J 113

3 *Mitti Sing* (1865) 3 W R (Cr) 41

4 *Dhaumnun* [illegible] W R [illegible]

5 *Shurufooddin* v *Keenaath*, [illegible] W R (Cr) 64.

6 *Doraswamy Pillai* [illegible]

Commencement and continuance of the right of private defence of property.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences[1].

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered[2].

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief[3].

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues[4].

COMMENT.

This section defines the commencement and continuance of the right of private defence of property just as s. 99 does in the case of defence of body. In both the cases the right commences with the reasonable apprehension of danger.

1. First clause.—The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences the owner of the property is not called upon to apply for protection to the public authorities. Where the accused apprehending opposition went armed to appraise crops, and, on the arrival of the opposite party similarly armed, did not wait till the opposite party had actually attacked, but proceeded to meet them, and a fight took place, it was held that the accused had acted within the right of private defence, which commenced as soon as the opposite party appeared with arms and began to move towards them, which was a distinct threat to attack them[1]. See Comment on clause (3) under s. 99, *supra*.

2. Second clause.—'Till the offender has effected his retreat with the property'.—"We are not sure of the meaning intended by the expression '*till the* offender has effected his retreat with the property'. We know not certainly when he is to be considered as having effected his retreat; probably it is when he has once got clear off, having escaped *immediate* pursuit, or pursuit not having been made;....We presume that the protection of parties pursuing robbers, &c., for the recovery of property which they have succeeded in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions, touching the right of private defence"[2]. It was suggested "that the privilege of this clause should operate till the offender is taken and delivered to an officer of Justice"[3]. The clause "or either the assistance of the public authorities is obtained" did not exist in the draft Code.

This provision only applies to stolen property and not to property acquired dishonestly within the meaning of ss. 403 and 411[4].

[1] *Hafiz Ali,* (1907) 10 O. C. 196.
[2] 1st Rep., s. 158.
[3] 1st Rep., s. 156.
[4] *Agra,* (1914) P. R. No. 37 of 1914.

removed, a recapture after an interval of time by the owner or by other person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which the section contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat, as where stolen cattle are tracked until ultimately overtaken in their retreat and recaptured[1] Mayne is of opinion that "resistance within the justifiable limits, may be continued so long as the wrongful act is going on But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day If, however, the property were found in his possession, the right of defence would revive for the purpose of its recovery It by no means follows, however, that the right would revive to the same extent as if formerly existed at the commission of the original offence Only such violence is lawful as would be justifiable against a person who has stolen property without intimidation, and if he resists by means which create

annot be killed, by virtue of any-
ground of distinction drawn in
In the former case, the right of

defence appears to last longer than it does in the latter What is meant is, that the right of defence against robbery, *as such*, only lasts as long as the robbery While the fear of death, hurt, or wrongful restraint, which causes theft to grow into robbery (s 390) continues the offender may be killed But when he takes to his heels with the booty the robbery is over, and the right of defence is

Mayne's view
of the Central
ight only exists

for the purpose of prevention of the offences named, in the particular case of theft the right continues for the recovery of the property even after the theft has been accomplished The extent of such right is that mentioned in s 104 The right and its extent being thus found, every case must thereafter be judged on its own particular facts, to decide whether or not the exercise of the right in the recovery of stolen property has been exceeded Here the exceptions contained in s 99 come in "If A runs away with B's watch, B may chase him until he effects his escape, but the right of self-defence does not end with the escape If B sees A in the street the next day, the next month, or the next year, wearing the stolen watch, B may forthwith seize A and recover his watch, using for the purpose as much force as the case allows If a policeman should be at hand, B's proper course *would be to hand A over to him and let him recover the watch But B is* not bound to put off the capture of A until he can find assistance from public authority Again, suppose that on a day after the theft thereof, B sees his watch lying on a table in a house or garden, if he can get the assistance of a policeman without losing sight of it, no doubt he would be bound to do so But he would

capture of the thief would not be an assault in the one case, and the entry into the house or garden would not be criminal trespass in the other"[3] But the Lahore High Court has differed from this view in a case in which the accused followed up tracks purporting to be those of their stolen cattle, and, prior

1 M. & M 81

2 Criminal Law of India 4th Edn, Part II, pp 231, 232

3 *Jarha Chamar v. Surd Ram*, (1907) 3 N. L. R 177, 181

to the arrival of the police (for whose assistance one of their party had ridden away) proceeded to the complainants' village and fired at them. It was held that the accused's right of private defence of their property had been put an end to by the successful retreat of the thieves, and that their alleged re-discovery of the cattle in the complainants' possession could not revive that right[1]. Le Rossignol, J. observed that "as soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists, but that, until the offender has so completed his retreat the right of private defence of that property continues until the property has been recovered, i.e., during the retreat of the offender, or until the assistance of the public authorities is obtained. In order to avoid the conclusion that the successful retreat of the thief with the property puts an end to the right of private defence in respect of such property, it has been suggested that that right of defence may be revived and that the stolen property, whenever seen again in the possession of anybody, may be taken by the owner from that person by the use of all the violence, not extending to the causing of death, which may be found necessary. This theory to my mind receives no support from the statute law and, if true, it constitutes a very serious derogation from the principle that no man shall be his own justicer. I take it that the reason why a person is permitted to take the law into his own hands during the retreat of a thief with stolen property is that there is no doubt regarding the identity of the thief and the right to the property; also because the owner of the property is entitled to maintain his possession and to prevent the completion of the removal of the property from his possession. A very different state of things, however, arises if the owner of a stolen watch be permitted to take the law into his own hands at any subsequent time and to use violence against any person who may or who may not be an innocent holder in order to retrieve from his possession a watch which may or may not be the stolen watch. If serious disorders are to be avoided the right of private defence must be strictly confined within the limits fixed by statute"[2]. Fforde, J., said that "if the thief has effected his retreat with the property, or if the assistance of the public authorities has been obtained, or if the property has been recovered, the owner of that property has no right to proceed with violence against the thief. To take the illustration given in the authority referred to. If A runs away with B's watch, B may chase him and seize his watch from him, using for that purpose such violence short of inflicting death as may be necessary for the purpose of recovering the property stolen. But if B fails to capture A and recover his watch, his right to recover the article by violence has ceased. Similarly, if, instead of pursuing A, B invokes the aid of a policeman for that purpose and the policeman captures A, B cannot intervene with violence for the purpose of recovering his article; and, again, if B by any means whatsoever recovers his watch, he cannot then proceed to use violence to the thief"[3]. When after a thief has effected his retreat with stolen property the property is subsequently found in his possession the owner's right of private defence does not revive for the purpose of its recovery[4].

3. **Fourth clause.**—Against criminal trespass the person in possession of the property has the right of private defence of property so long as the trespass continues and this right extends to causing to the trespassers any harm other than death subject to the restrictions mentioned in s. 99, namely, that no more harm should be inflicted than is necessary for the purposes of defence and that there is no time to have recourse to the protection of the authorities. If, in the exercise of this right, such resistance is offered by the trespassers that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, the right of private defence of person then arises and extends to the causing of death[5].

1 *Mir Dad,* (1925) 7 Lah. 21.
2 *Ibid,* p. 25.
3 *Ibid,* p. 28.
4 *Karam Ali,* (1927) 9 L. L. J. 260.
5 *Dukhit Sha,* (1920) 22 Cr. L. J. 177.

Where land in possession of A was encroached on by the servants of B who committed mischief on the land and the servants of A assembled after the alleged mischief had been completed there being no suggestion that the mischief was likely to be renewed it was held that the servants of A could not claim the right of private defence of property which had ceased under this clause[1]

The complainant s party consisting of twelve or thirteen persons went with pickaxes to a *bund* erected on the land of the master of the accused in order to cut it as it obstructed the flow of water from their lands and destroyed their crops The accused hearing of this at once assembled to the number of 50 or 60 armed themselves with clubs and proceeded to the *bund* At this time the com plainant s party had either finished the cutting or ceased to do so when they saw the accused approaching The latter attacked the complainant s party and drove them to their village One or more of the assailants also beat a man who was present there but was not connected with the cutting of the *bund* both in the first attack and when they returned from the chase and fractured his skull in con sequence of which he died shortly after It was held that the accused were members [illegible] with clubs and [illegible] the beginning [illegible] ence when the opposite party had ceased cutting the *bund* and that even if they had they [illegible] beating [illegible] on the [illegible] nplainant [illegible] an away towards the field of the accused and were chased by the complainant and his friends The chasers were joined by the deceased who lagged behind The accused inflicted fatal injuries on him It was held that the accused had no right of private defence as the deceased had not seized any cattle and was a mere straggler[3]

4 **Fifth clause** —The right of private defence against house breaking con tinues only so long as the house trespass continues hence where a person followed a thief and killed him in the open after the house trespass had ceased it was held that he could not plead the right of private defence[4]

106 If in the exercise of the right of private defence against an assault which reasonably causes the appre hension of death the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk

Right of private defence against deadly assault when there is risk of harm to innocent person

ILLUSTRATION

A is attacked by a mob who attempt to murder him He cannot effectually exercise his right of private defence without firing on the mob and he cannot fire without risk of harming young children who are mingled with the mob A commits no offence if by so firing he harms any of the children

COMMENT

This section should be read in the light of s 100 It provides for the [illegible] which a person may have to run to defend himself against an assault reason[illegible] causing the apprehens on of his death

1 *Raj Kristo Doss* (1869) 1[illegible] W R (Cr) 43
2 *Ambika Lal* (1908) 35 Cal 443
3 *Baryami* (1928) 30 Cr L J 697
4 *Balakee Jolahed* (1868) 10 W R [illegible] *Gulbadan* (1885) I P No 25 of 18[illegible]

CHAPTER V.

OF ABETMENT.

THIS Chapter applies to offences punishable under ss. 121A, 124A, 225A, 225B, 294A and 304A[1].

Abetment of a thing.

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

ILLUSTRATION.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

COMMENT.

When an offence is committed and several persons take part in the com mission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act.

The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person: and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid. It is proper to mark the nature and degree of participation which is essential to criminal liability, but it will be seen that the several gradations of action above referred to are not always treated as denoting necessarily different measures of guilt with a view to distinction in respect of punishment.

We have seen that if several persons, combining both in intent and act, commit an offence jointly, each is guilty, as if he had done the whole alone; and that so it is, if each has his several part to do, all contributing to one result. When

[1] Act XXVII of 1870, s. 13, as amended by Act XI of 1891.

all combine, each does the act so far as his own part extends, and, as to the residue, may be regarded as procuring it to be done by means of guilty agents all the parties, so concerned, stand in the m[illegible]
The present Chapter treats of co[illegible]
agent being urged forward by a [illegible]
or instigates another to put i[illegible]
Chapter persons rendering any kind of assistance to the criminal are punishable Jeremy Bentham[2] says "The more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself If the criminal be not stopped at the first step of his career, he may at the second or the third It is thus that a prudent legislator, like a skilful general reconnoitres all the external posts of the enemy with the intention of stopping his enterprises He places, in all the defiles in all the winding of his route a chain of works diversified according to circumstances but connected among themselves, in such manner that the enemy finds in each new dangers and new obstacles"

Abetment under the Penal Code involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code

Abetment is a separate and distinct offence provided the thing abetted is an offence[3] Abetment does not in itself involve the actual commission of the crime abetted It is a crime apart[4]

As a general rule a charge of abetment fails if the substantive offence is not established against the principal But there may be an exception where the substantive offence was undoubtedly committed and there is evidence, such as a retracted confession by the abettor, on which the jury might have found as against him that the offence was committed by the principal, though as against the latter, the confession would be insufficient for a conviction of murder[5]

Scope —The definition of 'abetment' given here applies to all Acts passed by the Government of India[6]

Ingredients —Abetment is constituted (1) by instigating a person to commit an offence, or (2) by engaging in a conspiracy to commit it, or (3) by intentionally aiding a person to commit it[7]

(1) **Abetment by instigation** —**First clause** —A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it take the form of express solicitation or of hints, insinuation or encouragement[8] The word instigate' means urge on, incite, bring about by persuasion, provoke[9] Advice can become 'instigation' if it is meant actively to suggest or stimulate the commission of an offence Advice *per se* cannot necessarily be instigation[10] A mere acquiescence, or permission, does not amount to an instigation Nor can deliberate absence from the scene of offence amount to instigation[11]. Instigation implies knowledge

1 M & M 83

2 Jeremy Bentham's Works Vol I Part III Ch XV, p 560

3 *Sesha Ayyar v Venkatasubba Chetty*, (1923) 33 M L T 263

4 *Barendra Kumar Ghosh* (1924) 52 I A. 40, 27 Bom L R 148 159 52 Cal 196

5 *Umadasi Dasi* (1924) 52 Cal 112

6 General Clauses Act (X of 1897) ss. 3, (1), 4 (2)

7 *Imamdi Bhooyah* (1873) 21 W R (Cr) 8

8 *Amiruddin Salebhoy* (1922) 24 Bom L R 534 542 6 Bom Cr C. 207

9 *Lakshminarayana Aiyar*, [1917] M W N 831, 22 M L T 373

10 *Raghunath Dass* (1920) 5 P L J 129 *Nazir Ahmad* (1926) 25 A L J 149

11 *Ettim Ali Majumdar*, (1900) 4 C W N 500

of the criminality of an act. Words which amount merely to a permission may perhaps amount to an instigation, but this will depend on the position of the speaker and the occasion on which they are spoken. Where the applicant expressed approval of the conduct of certain persons who were maltreating a tenant for committing extortion and as a result of his suggestion that "the tenants ought to be beaten", blows were inflicted, it was held that the applicant's remarks stimulated the commission of an offence and, therefore, his conviction under s. 330 and this section was proper[1].

The word 'instigation', as used in this section, may be an instigation of an unknown person[2].

Explanation 1 to this section says that a person who (1) by wilful misrepresentation, or (2) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes, or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. The illustration is an example of instigation by 'wilful misrepresentation'. Instigation by 'wilful concealment' is where some duty exists which obliges a person to disclose a fact.

The offence is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, or whether, having consented, he commits the crime or not. This form of abetment depends upon the intention of the person who abets, and not upon the act, which is actually done by the person whom he abets[3].

Instigation through a third party.—It is immaterial whether the instigation be personal, or through the intervention of a third person[4].

Cases.—Master's liability.—Where, of several persons constituting an unlawful assembly, some only were armed with sticks, and A, one of them, was not so armed, but picked up a stick, and used it, B (the master of A), who gave a general order to beat, was held guilty of abetting the assault by A[5]. The carrying off of certain buffaloes, belonging to the complainant, by order of the accused, and the retention of them in the custody of the latter's servant, were held to amount to an abetment of theft[6].

Suppression of evidence.—Where the accused asked a witness to suppress certain facts in giving his evidence, it was held that this was an abetment of giving false evidence[7].

Deliberate absence is no instigation.—Where persons of influence being aware of the objects of the members of an unlawful assembly deliberately absented themselves from the locality where such assembly was formed, it was held that that was not such sympathy as amounted to instigation[8].

Instigation to commit an offence by letter or telephone.—Where one person instigates another to the commission of an offence by means of a letter sent through the post, the offence of abetment by instigation is completed as soon as the contents of such letter become known to the addressee[9]. If the letter never reaches him the act is only an attempt to abet[10]. The accused telephoned to W asking if he could have two boys for immoral purposes. No particular boys were named or indicated. The accused was charged with inciting W "to procure the commission by certain male unknown persons of acts of gross indecency with him", the accused. It was held that as the accused was inciting W to commit what, if he had done the acts, would have been a criminal offence, it was immaterial that the male

1 *Nazir Ahmad*, (1926) 25 A. L. J. 149.
2 *Ganesh Damodar Savarkar*, (1909) 12 Bom. L. R. 105.
3 *Tha La Aung*, (1906) 12 Burma L. R. 70.
4 *Robert Car (Earl of Somerset)*, (1616) 2 St. Tr. 965.
5 *Rasookoollah*, (1869) 12 W. R. (Cr.) 51; *Ghanshyam Singh*, (1927) 29 Cr. L. J. 239.
6 *Tarinee Prosaud Banerjee*, (1872) 18 W. R. (Cr.) 8.
7 *Andy Chetty*, (1863) 2 M. H. C. 438.
8 *Etim Ali Majumdar*, (1900) 4 C. W. N. 500.
9 *Sheo Dial Mal*, (1894) 16 All. 389.
10 *Ransford*, (1874) 13 Cox 9.

persons whom he was to procure were not at the time ascertained or that the accused was inciting W to incite another to commit an offence, and that the accused was rightly convicted[1].

Consent to hold a stake—Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight, each put down £1, so that £2 might be paid to the winner The accused consented to hold the £3, and pay it over to the winner. Otherwise, he had nothing to do with the fight, and he was not present at it There was no reason to suppose that the life of either man would be endangered The men fought, and one of them received injuries of which he afterwards died The accused having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner It was held that the mere consent to hold the stakes could not be said to amount to a participation in the fight[2]

(2) **Abetment by conspiracy**—**Second clause**—"Conspiracy" consists in ... ie illegal act or to effect a legal ... sign rests in intention only, it ... effect, the very plot is an act ... against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means And so far as proof goes, conspiracy, as *Grose, J*, said in *Rex* v *Brisac*,[3] is generally 'matter of inference deduced from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose in common between them The number and the compact give weight and cause danger"[4]

Conspiracy is now made a substantive offence in India In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in ... place in pursuance of tha... It is not necessary that the ... commits it It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed[5] Where parties concert together and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan is the act of the whole[6]

A mere conspiracy would not amount to abetment, and it would appear that if conspirators were detected before they had done more than discussed plans, with a general intention to commit an offence, they would not be liable as abettors

Before the introduction of Chapter VA, conspiracy, except in cases provided for by ss 311, 400, 401, 402 and 121A of the Code was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence for each distinct offence abetted by conspiracy[8]

A conviction for conspiracy cannot stand when the charge against the ... When a conspiracy between several persons ... prosecution to prove before it can be held ... ew and had personal communication with all the rest because some of them might be intermediaries[10]

Conspiracy to commit various acts amounting to distinct offences—On this point the Madras High Court is equally divided in its opinion Three judges hold

1 *Bentley* [1923] 1 K B 403.
2 *Taylor*, (1875) L. R. 2 C. C. R. 147
3 (1803) 4 East 164 171
4 Per Willes, J, in *Mulcahy*, (1868) L. R. 3 H L. 306, 317 See *Quinn* v *Leathem*, [1901] A C. 495, 528
5 Explan 5 to s 108, *Kalil Munda*, (1901) 28 Cal 797, *Gobind Doboy* (1874) 21 W I

(Cr) 35.

that a conspiracy to commit various acts which are in themselves distinct offences is itself one offence under the Penal Code and not several abetments of those distinct offences[1]. Three others hold that conspiracy is a mere species of abetment when an act or illegal omission takes place in pursuance of the conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy[2].

Cases.—Suicide.—Sati.—Evidence that a woman prepared herself to commit suicide in the presence of the accused, that they followed her to the pyre and stood by her, her step-sons crying "Ram, Ram", and one of the accused admitted that he told the woman to say "Ram, Ram", and she would become *suttee*, was held to prove active connivance and unequivocal countenance of the suicide by the accused, and to justify the inference that they had engaged with her in a conspiracy for the commission of the *suttee*[3]. It is no defence that the abettors were expecting a miracle and did not anticipate that the pyre would be ignited by human agency[4].

Forgery.—To prepare, in conjunction with others, a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such document, are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence[5].

Abortion.—A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion[6].

Giving false information.—When, as a result of a conspiracy to make a false report, one person makes a false report in pursuance of the conspiracy and another accompanies him and says nothing, the person who tells the story is guilty under the provisions of s. 182 and the other of abetment[7].

(3) Abetment by aid.—Third clause.—(*a*) **By an act.**—A person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof (vide Expln. 2). For instance, the supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it[8]. "The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. But if the person who lends his support does not know or has no reason to believe that the act which he was aiding or supporting was in itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence. I will give an example. A, B and C are friends. A and B have fallen out, so much so that A is determined to shoot B. A goes to the house of C, and on some pretext or other induces C to call B to his house. C has not the least idea that A would shoot B on his arrival. B arrives and is murdered by A. A committed murder. Can it be said that C is guilty of abetment, because he 'intentionally aided' A? C did give his aid in calling B to his place. But he never

1 Per Sir Arnold White, C. J., Shepherd and Boddam, JJ., (1900) 1 Weir 47.
2 Per Davies, Benson and Moore, JJ., in *ibid.*
3 *Mohit Pandey*, (1871) 3 N. W. P. 316.
4 *Vidyasagar Pande*, (1928) 8 Pat. 74.
5 *Padala Venkatasami*, (1881) 3 Mad. 4.
6 *Whitchurch*, (1890) 24 Q. B. D. 420.
7 *Ram Jiawan*, (1926) 3 O. W. N. 96.
8 *Lingam Ramanna*, (1880) 2 Mad. 137.

knew why A wanted him to send for B Whatever C did, he did intentionally, for his intention it certainly was that B should come But it was not C's intention that a crime should be committed C cannot be held guilty of abetment of murder"[1]

Presence does not amount to aiding —Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances be held a direct encouragement, or unless some specific duty of prevention rests on him, which he leaves unfulfilled in such wise that he may be safely taken

it, but not the persons who were merely present at the celebration or who permitted its celebration in their house, when such permission afforded no particular facility for the act[4]

Cases —Giving of a house to extort a confession —A zemindar who had ... him to the police officer who ... the purposes of such investi ... he house the zemindar knew that it was likely to be used for the purpose of putting illegal pressure upon persons suspected of complicity in or knowledge of the theft, and also that the zemindar was at times present while the police-officer was engaged in that house in torturing certain persons summoned there by him, though he did not actually take part in the torturing It was held that the zemindar was, by virtue of explanation 2 guilty of doing an act in order to facilitate the commission of an offence under s 330[5]

Ordering an assault.—Where orders were given to assault a particular person, who died in consequence of the injuries inflicted, the person giving the orders was held guilty of abetting the commission of voluntarily causing grievous hurt[6] But if no definite orders were given there will be no abetment[7]

Giving of a weapon to a person to hurt another —Where A gave a *dao* to

Acceptance of an unstamped receipt is not aiding —Where a debtor paid a sum of money to his creditor, and asked for a stamped receipt from him, who had not at hand a stamp, and then accepted an unstamped receipt, saying he would affix a stamp thereto, which he did not do, it was held that this did not constitute abetment of the offence of giving an unstamped receipt because he had done or omitted nothing which it was in his power to effect[9]

Attestation or writing of a document is not aiding.—G, a prostitute, purchased a child for purposes of prostitution at her request the first accused wrote a document evidencing the transaction, the other three accused attested the document, and all the four accused were present when the child was handed over

1 Per Mukerji J in *Ram Nath*, (1924) 47 All 268 275, *Khevanti* (1928) 29 Cr L J 561
2 *Lakshmi*, (1886) Cr R No 51 of 1886, Unrep Cr C 303, *Shidlingappa* (1896) Cr R No 13 of 1896 Unrep Cr C 844, *Chatru Gope*, (1917) 19 Cr L J 63, *Yunus Ali*, (1928) 32 C W N 783
3 *Raja Khan*, (1930) 32 Cr L J 478.

to G. G also put into the hands of the first accused the price of the child, which money he handed over to the child's mother. It was held that the accused could not be convicted for abetment by intentionally aiding the illegal disposal of the child under s. 372[1].

Act abetted is illegal but not an offence.—A guardian of a Mahomedan married female infant aged six years who caused a marriage ceremony to be gone through in her name with another man, during the lifetime of her husband, but in her absence and without her consent, was held not to have committed the offence of abetting bigamy[2]. Because to constitute abetment the accused must be proved either to have instigated or aided some person to commit an offence. This case has been distinguished in a subsequent case in which a Hindu having given his daughter, said to be eight years old, in marriage to a certain person, again gave her in marriage to another in the lifetime of her first husband. It was held that he was guilty of an offence under s. 109 read with s. 494, although his daughter had not the knowledge and intelligence necessary to enable her to commit an offence under s. 494[3].

(*b*) **By illegal omission.**—To prove abetment by 'illegal omission,' it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference[4]; and the omission involved a breach of a legal obligation[5]. Thus every police-officer is bound to shelter a person in custody and to arrest persons committing assaults likely to cause grievous bodily injury and if he omit to perform his duty, he is guilty of abetment[6].

Cases.—Non-interference where there is duty to interfere.—A village Magistrate, who was present while certain police constables were wrongfully confining and causing hurt to a resident of the village to extort a confession and who did not interfere with nor stop the criminal act committed in his presence nor report them to a Magistrate, was held guilty of abetment of offences under ss. 330 and 348 of the Penal Code[7]. But the mere fact that the offence of extortion was committed in the presence of a village *chowkidar* without eliciting any disapproval on his part was held not to render him liable as an abettor[8]. Where a Head Constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, it was held that he was guilty of abetment[9].

Omission must be of legal obligation.—A motor car was driven by the chauffeur of the accused, on a road in Mahableshwar, driving over which was forbidden under s. 9 of the Motor Vehicles Act, 1904. The accused was at Poona then but was convicted of abetment of the offence under s. 13 of the Act on the ground that it was his duty to inform the driver of the existence of the prohibition. It was held on revision by the High Court that as no legal obligation was imposed on the accused to instruct his servant he was not liable[10]. Where it was not proved that accused's intention in omitting to report a plot, under s. 44 of the Criminal Procedure Code, was with a view to aiding the waging of war, it was held that the accused could not be convicted of the offence of abetment of waging war[11]. A and B entered into a conspiracy that B should falsely personate X, and withdraw money held in deposit at the Collectorate. A wrote a letter to C saying that B was X, and C on the faith of this assurance and in good faith

1 *Bondili Sankara Singh*, (1884) 1 Weir 47.
2 *Abdool Kurreem*, (1878) 4 Cal. 10.
3 *Nand Lal Singh*, (1902) 6 C. W. N. 343.
4 *Khajah Noorul Hoosein* v. *Fabre-Tonnerre*, (1875) 24 W. R. (Cr.) 26.
5 *Khadim Sheikh*, (1869) 4 Beng. L. R. (A. Cr. J.) 7; *Cooverji*, (1906) 9 Bom. L. R. 159, 161; *Shevanti*, (1928) 29 Cr. L. J. 561.
6 *Latifkhan*, (1895) 20 Bom. 394.
7 *Appanna Hegade*, (1899) 1 Weir 52; *Krishna Shetti*, (1891) 1 Weir 50.
8 *Kali Churn Gangooly*, (1873) 21 W. R. (Cr.) 11.
9 *Gopal Chunder Sirdar*, (1882) 8 Cal. 728; but see *Lakshmi*, (1886) Unrep. Cr. C. 303.
10 *Cooverji*, sup.
11 *Goman Saya*, (1913) 14 Cr. L. J. 610.

identified B as X at the teasury and B withdrew the amount It was held that the failure c
X only on t
meaning of
personation

Attempt—The abetment of an offence within the meaning of s 40 being itself an offence punishable under this Chapter, an attempt to commit the offence of abetment is provided for in s 511, and there is therefore no legal obstacle to punishing such offence[2].

English law.—According to English law, criminals are divided into four classes The distinction is based on the consideration whether a party was present or absent at the commission of the offence

(1) *Principal in the first degree*—One who is the actual perpetrator of the crime It is not necessary that he should be actually present when the offence is consummated, thus one who lays poison or a trap for another is a principal in the first degree Nor need the deed be done by the principal's own hands for it will suffice if it is done through an innocent agent, as for instance, if one incites a child or a madman to murder Even an animal may be employed as an innocent agent For example, a person who sets a dog upon people is himself guilty of assaulting them

(2) *Principal in the second degree*—One by whom the actual perpetrator of the crime is aided and abetted at the very time when it is committed He may or may not be actually present at the scene of the crime It will suffice, if he has the intention of giving assistance, and is sufficiently near to give the assistance as when one is watching outside, while others are committing a felony inside the house, or seconds in a prize fight which ends fatally. An aider or abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose

Both the above classes of principals are liable to the same punishment

(3) *Accessory before the fact*—One who being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony He is punishable in all respects as the principal felon If present at the commission he would be a principal

(4) *Accessory after the fact*—One who, knowing a felony to have been committed by another, receives, relieves, comforts, assists, harbours or maintains the felon.

A felony must be actually committed, or there cannot be any accessories

Principals are dealt with in the Penal Code under ss. 34 to 38 There is no distinction between 'principals in the first degree' and 'principals in the second degree,' in the Code Under English law this distinction is confined to felonies only It does not exist in cases of misdemeanour or serious offences as high treason or forgery

The offence of abetment corresponds as nearly as one word can be said to correspond to another to the offence which is known in England of being an 'accessory before the fact'. But mere concurrence—that kind of passive concurrence which is known in England as being an "accessory after the fact'—is not abetment and is not to be treated as abetment

'Accessory after the fact' is treated in scattered sections See provisions relating to harbouring, ss 212, 216, and, also, ss 130, 136, 137, 410-414

[1] *Radhe Kishun*, (1929) 10 P L. T. 657. *Balu* (1899) 24 Bom 287, 1 Bom L. R. 676
[2] *Spier*, (1887) P R. No. 49 of 1887 See

PRACTICE.

Evidence.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it[1]. 'Conspiracy' is a fact which even in a criminal case can be inferred from circumstantial or oral evidence[2]. A conspiracy may be proved by other than oral evidence: it may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime[3]. Direct evidence of conspiracy is hardly ever adduced but unlawful conspiracy is to be inferred from the conduct of the parties[5].

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal[5]. It is necessary to prove criminal intention against the accused. The finding that accused No. 1 could not have acted in the illegal way without the approval and connivance of accused No. 2 is not sufficient to prove abetment[6].

Procedure.—It is not open to an appellate Court to find a man guilty of the abetment of an offence on a charge of the offence itself[7]. But if on facts the accused may be charged with the principal offence and abetment, he may be convicted of abetment though only charged with the principal offence[8].

Abettor.

108. A person abets[1] an offence who abets either the commission of an offence, or the commission of an act[2] which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1[3].—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.[4]—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

ILLUSTRATIONS.

(*a*) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(*b*) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

1 Indian Evidence Act, I of 1872, s. 10.

2 Per Fawcott, J., in *Mahomed Ibrahim Amiruddin Munshi*, Cr. Appeal No. 505 of 1926, decided on January 10, 1927, (Unrep.)

3 *Annappa Bharamgauda*, (1907) 9 Bom. L. R. 347; *Jumo Allarakhio*, (1916) 9 S. L. R. 223.

4 *Duffield*, (1851) 5 Cox 404.

5 *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

6 *Ramnarayan Misra*, (1921) 2 P. L. T. 193.

7 *Chand Nur*, (1874) 11 B. H. C. 240; *Padmanabha Panjikannaya*, (1909) 33 Mad. 264.

8 *Yeditha Subbayya*, [1912] M. W. N. [725.

Explanation 3[5] —It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge

ILLUSTRATIONS

(a) A with a guilty intention abets a child or a lunatic to commit an act which would be an offence if committed by a person capable by law of committing an offence and having the same intention as A Here A whether the act be committed or not is guilty of abetting an offence

(b) A with the intention of murdering Z instigates B a child under seven years of age to do an act which causes Z s death B in consequence of the abet ... ath Here though ... to be punished in ... ng an offence and ... the punishment of death ... B in consequence of the ... the nature of the act or that he is doing what is wrong or contrary to law sets fire to the house in consequence of A s instigation B has committed no offence but A is guilty of abetting the offence of setting fire to a dwelling house and is liable to the punishment provided for that offence

(d) A intending to cause a theft to be committed instigates B to take property belonging to Z out of Z s possession A induces B to believe that th property belongs to A B takes the property out of Z s possession in good faith believing it to be A s property B acting under this misconception does not take dishonestly and therefore does not commit theft But A is guilty of abetting theft and is liable to the same punishment as if B had committed theft

Explanation 4[6] —The abetment of an offence being an offence, the abetment of such an abetment is also an offence

ILLUSTRATION

A instigates B to instigate C to murder Z B accordingly instigates C to murder Z and C commits that offence in consequence of B s instigation B is liable to be punished for his offence with the punishment for murder and as A instigated B to commit the offence A is also liable to the same punishment

Explanation 5[7] —It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed

ILLUSTRATION

A concerts with B a plan for poisoning Z It is agreed that A shall administer the poison ... person is to administe ... procure the poison ar ... used in the manner e ... ence Here though A and C have not conspired together yet C has been engaged in the conspiracy in pursuance of which Z has been murdered C has therefore committed the offence defined in this section and is liable to the punishment for

COMMENT.

'Abettor' under this section means the person who abets (1) the commission of an offence, or (2) the commission of an act which would be an offence if committed by a person not suffering from any physical or mental incapacity. In the light of the preceding section he must be an instigator or a conspirator or an intentional helper. This section is in conformity with the English law except on one point. Under English law a person using an innocent agent as his tool is deemed to be a principal whereas under this section he is treated as an abettor. So far as the actual result is concerned this distinction has not much meaning.

1. **'Abets'.**—See s. 107, *supra*. In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but it is absolutely necessary to connect him in some way or other with those steps of the transaction which are criminal[1].

2. **'Commission of an act'.**—There must be abetment of the commission of an act. The section does not contemplate any acts of subsequent abetment. Thus, a person cannot be convicted of abetment of a false charge solely on the ground of his having given evidence in support of such charge[2].

An act done after an offence is complete which might help the offender does not amount to abetment[3].

3. **Explanation 1.**—If a public servant is guilty of an illegal omission of duty made punishable by the Code, and a private person instigates him he abets the offence of which such public servant is guilty, although the abettor, being a private person, could not himself have been guilty of that offence.

4. **Explanation 2.**—The offence of abetment is complete notwithstanding that the person abetted refuses to do the thing, or fails involuntarily in doing it, or does it and the expected result does not follow. The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets[4]. If it was impossible to accomplish the commission of an offence in a way suggested by the abettor and no offence is committed then the abettor would not be liable.

'Effect requisite to constitute the offence, etc.'—An offence can be abetted though the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them[5]. Where, therefore, the accused offered money for the killing or disabling of the deceased by means of charms and it was left to the persons who were to earn the money to decide whether their victim was to be killed or disabled, it was held that he was guilty of abetment of murder[6]. In a Bombay case a doubt has been expressed whether abetment of murder by sorcery or other impossible means is an offence under the Code[7].

5. **Explanation 3.**—If a man does, by means of an innocent agent, an act which amounts to a crime, the employer, and not the agent, is accountable for the act[8]. Illustrations (*b*), (*c*) and (*d*) exemplify this explanation. R sold to D certain trees which in fact and to the knowledge of R, though not to the knowledge of D, belonged to a third person. The trees were sold to D with the intention that they should be cut down and taken away. It was held that R had committed the offence of abetment of theft[9].

1 *Rajmal*, (1924) 26 Cr. L. J. 1069.
2 *Ram Panda*, (1872) 9 Beng. L. R. App. 16; *Paun Pundah*, (1872) 18 W. R. (Cr.) 28; *Jugut Mohini Dassee*, (1881) 10 C. L. R. 4.
3 *Hazari Lal*, (1920) 22 Cr. L. J. 452.
4 *Imamdi Bhooyah*, (1873) 21 W. R. (Cr.) 8.
5 *Sahib Ditta*, (1885) P. R. No. 20 of 1885.
6 *Ibid*.
7 *Pestonji Dinsha*, (1873) 10 B. H. C. 75.
8 *Joan Bleasdale*, (1848) 2 C. & K. 765; *Dhaniram*, (1901) 14 C. P. L. R. 192.
9 *Ram Charan*, (1898) 18 A. W. N. 147.

'Guilty intention or knowledge'.—The offence of abetment depends upon the intention of the person who abets and not upon the knowledge or intention of the person he employs to act for him

English law—If the person abetted does not know that the act is illegal he is considered as an innocent agent only, and the abettor is held liable as a principal

6. **Explanation 4.**—According to this explanation a person may make himself an abettor by the intervention of a third person, without any direct communication between himself and the person employed to do the thing

'Abetment of an offence being an offence'.—These words do not mean "when an abetment of an offence is actually committed", but that when the abetment of an offence is by definition or description an offence under the Penal Code that is, when an abetment of an offence is punishable under s 109 or s 116 or other provision of the Code then the abetment of such abetment is also an offence Where S instigated K, a bench clerk in the Court of M, a Presidency Magistrate to instigate the latter to accept an illegal gratification for acquitting an accused

Abetment of such an abetment.—It is not necessary to an indictment for the offence of abetment of an offence to show that such offence was actually committed[2]

with medicine for the purpose of poisoning her son in-law, it was held that the offence committed might be treated as an instigating of the doctor to abet the accused in the commission of the murder, and, with reference to this explanation, might have been punished under ss 116 and 302[4]

7. **Explanation 5.**—It is not necessary that all persons joining in any conspiracy must be aware of every secret or every minute detail When the number of persons conspiring to do a particular act is very large there will be a few amongst them who will plot and plan, and though the others are not fully

...o persons ...gery, and ...e plate to ...was held that they were both correctly charged as principals[5].

Mere knowledge—Mere subsequent knowledge of the offence is insufficient to constitute abetment[6] And mere knowledge of a design on the part of another to commit an offence and speaking to that other about it without evidence that the person aware of the design instigated the other by word or deed to commit the offence, does not constitute abetment[7].

Principal cannot be abettor.—A person who has been convicted of an offence as principal cannot also be punished for abetting it[8].

1 *Srilal Chamaria* (1918) 46 Cal. 607
2 *Troyluckho Nath Chowdhry* (1878) 4 Cal 366, *Dinonath Buroa* (1872) 18 W. R (Cr) 32
3 *Troyluckho Nath Chowdhry* sup
4 *Musst Bakhtawar*, (1882) P R No 24

of 1882

PRACTICE.

The offence of abetment is a substantive one, and the conviction of an abettor is, therefore, in no way dependent on the conviction of the principal[1].

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal[2].

Abetment in British India of offences outside it.

108A. A person abets an offence within the meaning of this Code who, in British India, abets the commission of any act without and beyond British India which would constitute an offence if committed in British India.

ILLUSTRATION.

A, in British India, instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.

COMMENT.

Object.—This section was added by Act IV of 1898, s. 3. It provides for the punishment of abetment of the commission of an offence outside British India. The Select Committee in their Report observed: "We have made it an offence for a person in British India to abet any act which would be an offence if committed in British India, but, as a fact, is committed outside. In short, to put it in popular language, we have extended the law of abetment of offences committed outside British India. It has been held by the Bombay High Court that if a person in British India abetted or incited a murder in Goa, he would not be guilty of any offence. We have come to the conclusion that he ought to be deemed guilty of an offence, and that India is not to be made an alsatia for instigators of crime"[3].

The section provides for the difficulty discussed in *Gunpatrao's case*[4] in which it was held that an abetment in British India by a British subject of an offence committed in a foreign territory was not an offence punishable under the Penal Code, and could not, therefore, be tried by a Court in British India. Under the section it is essential that the offence abetted shall be an offence recognised in British India and that its abetment shall be complete in British India.

The section contemplates that the abetment shall be completed in British India. If the act committed in British India amounts to preparation only it will not be punishable. The illustration is, however, not very clear. If A is in British India and B in Pondicherry, A can only abet an offence by him either by a letter or some other mode of communication. Even if the letter be written in British India yet until it reaches B it can hardly be said that B has been instigated. If the instigation, in fact, takes place when the letter reaches B, then the instigation has taken place in Pondicherry and not in British India.

PRACTICE.

Procedure.—No Court shall take cognizance of an offence punishable under this section unless upon complaint made by order of Government[5].

1 *Maruti Dada*, (1875) 1 Bom. 15; *Dinonath Burooa*, (1872) 18 W. R. (Cr.) 32; *Sahib Ditta*, (1885) P. R. No. 20 of 1885.

2 *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

1 G. I. 1897, Part VI, p. 238. See *Baku*, (1899) 1 Bom. L. R. 678, 24 Bom. 287.

2 (1894) 19 Bom. 105.

3 Criminal Procedure Code, s. 196.

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment

109. Whoever abets any offence[1] shall, if the act abetted is committed[2] in consequence of the abetment and no express provision[3] is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation —An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

ILLUSTRATIONS

(*a*) A offers a bribe to B a public servant, as a reward for showing A some favour in the exercise of B's official functions B accepts the bribe A has abetted the offence defined in section 161

(*b*) A instigates B to give false evidence B, in consequence of the instigation, commits that offence A is guilty of abetting that offence, and is liable to the same punishment as B

(*c*) A and B conspire to poison Z A, in pursuance of the conspiracy procures the poison and delivers it to B in order that he may administer it to Z B in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death Here B is guilty of murder A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder

COMMENT.

Under this section the abettor is liable to any punishment which may be inflicted on the principal offender (1) if the act of the latter is committed in consequence of the abetment and (2) no express provision is made in the Code for the punishment of such an abetment This section lays down nothing more than that if the Code has not separately provided for the punishment of an abetment as such then it is punishable with the punishment provided for the original offence[1]

In order to abet under this section it is not necessary that the abettor must be absent[2]

1. 'Offence' —See s 40, *supra* Abetment of an offence under a local law (e g , Madras Act V of 1920) is an offence falling within the purview of this section[3] But abetmet of a breach of the bye law framed under a local Act is not an abetment of an offence within the meaning of this section unless the breach of the bye-law is made punishable under the local Act[4].

2 'Is committed' —Under this section the act abetted should be committed in consequence of the abetment[5], or in pursuance of the conspiracy (see Explanation) Assisting in the preparation of an offence which leads to nothing does not amount to an abetment under this section[6] Offering gratification as [illegible] gainst the accused under the Motor Car [illegible] was held not to amount to an abetment [illegible]

3. 'No express provision'.—This section only applies to those cases of abetment about which 'no express provision is made by this Code'. Hence it does

1 *Sesha Ayyar v Venkatasubba Chetty*, (1923) 33 M L T 263
2 *Nirmal Kanta Roy* (1914) 41 Cal 1072
3 *Sesha Ayyar v Venkatasubba Chetty* sup
4 *Mi Khwet Kye*, (1928) 6 Ran. 791
5 *Rajcoomar Banerjee*, (1862) 1 (O S) 105
6 *Surat Bahadur*, (1924) 1 O W
7 *Shamsul Huq* (1920) 33 C. L. J

Charge.—In a charge of abetment, the section of the principal offence, and the particular section of this Chapter under which the case falls should be mentioned with the circumstance which brings it under the said section[1].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you——as follows:—

That XY (*if the person is not known say that an unknown person*) on the——day of——, at——, committed the offence of——, and that you at——, abetted the said XY (*or person unknown*) in the commission of the said offence of——, which was committed in consequence of your abetment, and you have thereby committed an offence punishable under ss. 109 and——of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*omit the words* "by the said Court" *in cases tried by Magistrate*)] on the said charge.

When the abettor is charged with the person committing the offence the charge should run thus:

That you——, on or about the——day of——, at——, abetted the commission of the offence of——by ——which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under ss. 109 and——of the Indian Penal Code, and within the cognizance of my Court [*or* the Court of Session].

Punishment of abetment if person abetted does act with different intention from that of abettor.

110. Whoever abets the commission of an offence[1] shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

COMMENT.

This section says that though the person abetted commits the offence with a different intention or knowledge yet the abettor will be punished with the punishment provided for the offence abetted. The liability of the person abetted is not affected by this section.

Explanation 3 to s. 108 bears relation to this section. See ill. (*d*).

1. **'Offence.'**—Offence under this section denotes a thing punishable under this Code, or under any special or local law (s. 40).

PRACTICE.

Procedure.—Same as for the offence abetted.

Liability of abettor when one act abetted and different act done.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso.

Provided the act done was a probable consequence[1] of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

[1] (1865) 3 W. R. (Cr. L.) 5; (1864) 1 W. R. (Cr. L.) 9.

ILLUSTRATIONS.

(a)
for that
the poiso
was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y

(b) A instigates B to b
time commits theft of pro

n inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose B and C break into the house, and being resisted by Z, one of the inmates, murder Z Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder

COMMENT

Principle.—This section proceeds on the maxim "every man is presumed to intend the natural consequences of his act"

"If one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last mentioned crime, if it is one which, as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. For example, if A says to B —'You waylay C on such and such a road and rob him, and if he resists, use this sword, but not
ble as an abettor of
To put it in plain
the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself, and if, in order to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former"[1]

Foster[2] says "If the principal totally and substantially varies, if being solicited to commit a felony
of another, he will stand sin
be involved in his guilt .
temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessary before the fact, if present a principal . . A commands B to murder C by poison, B does it by a sword, or other weapon, or by any other means A is accessary to this murder for the murder of C was the object principally in his contemplation, and that is effected So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advice will be an

[1] Per Straight, J., in *Mathura Das*, (1884) 6 All. 491, 494

[2] Crown Cases, pp 369, 370

A is accessary to the burning of this latter house. These cases are all governed by one and the same principle. The advice, solicitation, or orders in substance were pursued and were extremely flagitious on the part of A. The events, though possibly falling out beyond his original intention, were *in the ordinary course of things the probable consequences of what* B *did under the influence, and at the instigation of* A. And, therefore, in the justice of the law, he is answerable for them."

1. **'Probable consequence.'**—The expression 'probable consequence' means a consequence which could have been within the contemplation of a reasonable man[1]. The test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. But it is sufficient for a conviction if the act done was a probable consequence of the abetment. It is not necessary that the abettor should know it to be a probable consequence[2].

See illustrations to this section, but the act done must have been committed in pursuance of the conspiracy[3].

CASES.

Where several persons turned out to beat a man, but one of them killed him, it was held that as the intention of all of them was to beat him only they would be liable for grievous hurt, but the killing of the deceased went so far beyond the common purpose that it could not be said to have been a probable consequence of the abetment[4]. Where A ordered B and C to seize and forcibly take D in the contemplation of an assault upon D, and D was so beaten and tortured as to have died in consequence, it was held that A was guilty at least of abetting the commission of voluntarily causing grievous hurt[5]. B and C instigated A to rob the deceased on his return home after receiving a sum of money: whereupon A killed the deceased. A was convicted of murder and B and C of abetment of murder under this section and s. 302. But the High Court altered the conviction of B and C to those under ss. 109 and 392[6].

PRACTICE.

Evidence.—Prove (1) That the accused abetted the commission of a particular act.

(2) That the act actually committed was done under the influence of such abetment.

(3) That the act done was a probable consequence of the abetment.

Procedure.—Same as that for the offence abetted[7].

Abettor when liable to cumulative punishment for act abetted and for act done.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence,[1] the abettor is liable to punishment for each of the offences.

ILLUSTRATION.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily

[1] Per Crump, J. in *Shafi Ahmed*, (1925) Case No. 22, Second Criminal Sessions, 1925, decided on May 23, 1925. (Unrep.)
[2] M. & M. 91.
[3] *Nilakanta*, (1912) 11 M. L. T. 1.
[4] *Goluck Chung*, (1866) 5 W. R. (Cr.) 75.
[5] *Doorgessur Surmah*, (1867) 7 W. R. (Cr.) 61 [97].
[6] *Mathura Das*, (1884) 6 All. 491.
[7] See *Harnam Singh*, (1919) P. R. No. 21 of 1919.

causes grievous hurt to the officer executing the distress As B has committed both the offence of resisting the distress and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences, and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences

COMMENT.

This section is a further extension of the principle enunciated in the preceding section it is much wider than the English law on the point Under it the abettor is punished for the offence abetted as well as the offence committed

1. 'Offence.'—See s 40, *supra*

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor

113 When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect

ILLUSTRATION

A instigates B to cause grievous hurt to Z B, in consequence of the instigation causes grievous hurt to Z Z dies in consequence Here if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder

COMMENT

This section should be read in conjunction with s 111 Section 111 provides for the doing of an act different from the one abetted, whereas this section deals with the case where the act done is the same as the act abetted but its effect is different To make the abettor liable it must be shown that he knew that the act abetted was likely to cause that effect This can be done by shewing that a reasonable man would draw an inference that a particular effect was likely to ensue from a particular act

Abetment of attempt to murder.—It is somewhat difficult to conceive circumstances which would constitute instigation to another to make merely an attempt to murder Prima facie any incitement to use violence to another would fall under one of the two categories viz, to cause death, or to cause hurt, grievous or simple[1]

PRACTICE

Procedure—Same as that for the offence abetted

Abettor present when offence is committed

114 Whenever any person, who if absent would be liable to be punished as an abettor[1], is present when the act or offence for which he would be punishable in consequence of the abetment is committed[2], he shall be deemed to have committed such act or offence[3].

[1] *Nga Po Aya*, (1903) 9 Burma L. R. 190

COMMENT.

Principle.—The meaning of this section is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another man actually committed it. The section says that the person present is deemed to have committed the offence, not that he has committed it. It simply provides for the punishment of what the English law calls 'principals in the second degree.' A person present abetting an offence is to be deemed to have committed the offence though he does not, in fact, do so any more than a 'principal in the second degree' does[1]. Where, for instance, a blow is struck by A, in the presence of and by the order of B, both are principals in the transaction. If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was[2]. If A instigates B to murder Z, he commits abetment; if absent, he is punishable as an abettor, and if the offence is committed, then under s. 109, if present, he is by this section deemed to have committed the offence and is punishable as a principal.

Scope.—Section 109 and this section supersede the English law as to principals in the first and second degrees and accessories before the fact.

This section deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat[3]. It only applies when an abettor has done something constituting abetment prior to the commission of the crime itself, and when he has also been present at the commitment of the crime, but has not actually committed it[4]. The abetment must have been completed before the actual offence is committed[5]. It is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission of the offence. In such a case the person is guilty of the offence itself and not merely of abetment except in cases like rape or bigamy where the person committing the offence alone can be guilty of it[6].

Sections 34 and 114.—Under s. 34 if a criminal act is done by several persons, each is liable as if it were done by himself alone; so that if two or more persons are present aiding and abetting in the commission of a murder, each will be tried and convicted as a principal, though it might not be proved which of them actually committed the act. This section refers to cases somewhat different, namely, where a person by abetment, previous to the commission of the act, renders himself liable as an abettor, is present when the act is committed, but takes no active part in the doing of it[7].

1. 'Who if absent would be liable to be punished as an abettor'.—To bring a person within this section the abetment must be complete apart from the presence of the abettor[8]. It is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor" and then to show that he was present when the offence was committed[9]. Previous concert is an essential factor in the constitution of the offence of abetment under this section. Where both master and servant were present and the latter received money for selling *ganja* in contravention of the terms of the license, it was held that having regard to the provisions of s. 34 the

1 (1869) 4 M. H. C. App. 37; 1 Weir 50; *Peer Mahomed*, (1872) 17 W. R. (Cr.) 52; *Chima*, (1871) 8 B. H. C. (Cr. C.) 164.

2 *Mahomed Asger*, (1874) 23 W. R. (Cr.) 11.

3 *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 148, 159, 52 Cal. 197.

4 *Ghosh*, (1915) 8 L. B. R. 275, F.B.

5 *Annavi*, (1924) 21 L. W. 19; *Ram Ranjan Roy*, (1914) 42 Cal. 422.

6 *Jogali Bhaigo Naiks*, (1926) 27 Cr. L. J. 1198.

7 *Jan Mahomed*, (1864) 1 W. R. (Cr.) 49.

8 *Vijayaranga Naidu*, (1927) 53 M. L. J. 760.

9 *Mussamut Niruni*, (1867) 7 W. R. (Cr.) 49; *Abhi Misser* v. *Lachmi Narain*, (1900) 27 Cal. 566; *Hansa Pathak* v. *Bansi Lal Das*, (1901) 8 C. W. N. 519; *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 27 Bom. L. R. 159.

servant was liable for the illegal sale, but that this section would not apply "unless the person present abetting the offence would, if absent, have been guilty of abetment"[1]

Where no conspiracy, instigation, or act, or illegal omission, is proved and the abetment consists only of participation in the actual commission of the offence, s 109, is the section applicable[2]

3. **'Is present when the act or offence . is committed'.**—The mere presence as an abettor of any person will not render him liable for the offence committed[3] He must be sufficiently near to give assistance[4] and there must be a participation in the act[5] Presence is either actual or constructive It is not necessary that the party should be actually present an ear or eye witness of the transaction, he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise Presence during the whole of the transaction is not necessary For instance, if several persons combine to forge an instrument and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals[6] If a man is simply present whilst an offence is committed, but does not take any part in it he will not be liable merely because he takes no steps to prevent the offence[7]

The mere presence of a person on the occasion of giving a bribe and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co operated in the payment of the bribe, or was instrumental in the negotiations for the payment[8]

The act at the doing of which the abettor is present must amount to an offence Thus this section is not applicable to the case of a person abetting the pledging of a thing entrusted to a stranger[9]

If an abettor of an offence is, on account of his presence at its commission, to be charged under this section as a principal, his abetment must continue down to the time of the commission of the offence If he distinctly withdraws at any moment before the final act is done, the offence cannot be held to have been committed with his continuing abetment[10]

A conviction under this section cannot stand where the abetment charged necessarily requires the presence of the abettor To come within the section, the abetment must be complete apart from the presence of the abettor[11] One R was [illegible]

persons who were admittedly eye witnesses to the occurrence were not called as witnesses by the prosecution It was held that the conviction of R under s 302 and this section could not stand as the only abetment charged necessarily required

[1] *Keshwar Lal Shaha, v Girish Chunder Dutt*, (1902) 29 Cal. 496, 498

[2] *Abdulla Khan*, (1899) P R No 15 of 1899

[3] *Abhi Misser v Lachmi Narain*, (1900) 27 Cal. 566, *Deodhar Singh* (1899) 27 Cal 144, *Chatradhari Goala* (1897) 2 C W N 49 A doubt has been expressed whether there can be abetment of a riot Holmwood, J, said 'We can see no reason why a riot should not be abetted as well as any other crime The only difficulty arises from the presence of the accused at the riot which renders them liable [illegible]

[4] *William Stewart* (1818) R. & R 363, *Patrick Kelly*, (1820) R & R 421, *Howell*, (1839) 9 C & P 437

[5] *Muradi*, (1910) P W R (Cr) No 6 of [illegible]

the presence of R, while to come within this section the abetment must be complete apart from the presence of the abettor[1].

Cases.—Where the accused came with a number of armed men and forcibly carried off a crop without the consent of the owner, it was held that even if they took no part in the actual carrying off, they must be considered as principals[2].

Where A urged B to attack C, B stabbed with a knife, but there was no proof that B had the knife in his hand at the time of A's urging him on, or that A knew in any other way that B would be likely to use a knife. It was held that A could not be convicted of abetting an offence under s. 326, but only of abetting an assault[3].

Persons who incite others to commit criminal trespass under s. 447 and are present when that trespass is committed, though they do not themselves commit it are guilty of criminal trespass in virtue of the provisions of this section[4]. One S was charged with having abetted the murder of one M by being present and instigating the other accused in striking and thereby killing him. It was held that the act of S amounted to an abetment of the offence of murder[5].

Person watching outside a house while an offence is being committed inside. Where a person watched the door of a house while a murder was being committed inside, he was held guilty of murder. A conspirator, who stood outside of a house, while his friends entered inside and looted it, and watched out in pursuance of the common design, was held guilty under this section[6].

English cases.—A person waiting outside of a house to receive goods which a confederate was stealing in the house was held to be the 'principal' in the theft[7]. Where several persons were acting together, some in the shop and some out, and the property was stolen by the hands of one of those who were in the shop, it was held that those who were outside were equally guilty as principals[8]. J had employed M to load sacks of oats, the property of J, from a vessel on to the trams of K, who was to carry them on the trams to the warehouse of T. By previous concert between M and K oats were taken by M from two of the sacks and put into a nose bag in the absence of K, and hidden under a tram. K returned in a few minutes and took the nose bag and its contents from under the tram and took them away, M being then within three or four yards of him. It was held that as both had been present at some parts of the transaction, both could be convicted as principals in the larceny[9]. S was a barman at a refreshment bar, and C went up to the bar, called for refreshments and put down a florin. S served C, took up the florin, and took from his employers' till some money, and gave C as his change 18*s.* 6*d.*, which C put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S and C, and C was present when S took the money from the till. It was held that C was liable as principal in the second degree[10].

3. **'He shall be deemed to have committed such act or offence'.**— These words are very important. Their effect is that the person present is to be treated in the same way as if he had committed the offence. This is not the same thing as saying 'he has committed the offence.' The person present is deemed to have committed the offence, not that he has committed it. It is upon this ground that the previous conviction of an accused for an offence cannot be taken into con-

1 *Ram Ranjan Roy*, (1914) 42 Cal. 422.
2 *Shib Chunder Mundle*, (1867) 8 W. R. (Cr.) 59.
3 *Tha Mya*, (1908) 4 L. B. R. 271.
4 *Patilbua Raojibala Gavli*, (1926) 28 Bom. L. R. 1029.
5 *Dhani*, (1926) 8 L. L. J. 509.
6 *Khandu Vishnu Sathe*, (1899) 1 Bom. L. R. 351.
7 *Joseph Owen*, (1825) 1 Mood. Cr. C. 96.
8 *Charles Gogerly*, (1818) R. & R. 343.
9 *Martin Kelly*, (1847) 2 C. & K. 379.
10 *Coggins*, (1873) 12 Cox 517.

sideration at a subsequent conviction for abetment for the purpose of enhancing punishment under s 75[1]

When one thing is not the same as another thing, but the Legislature says that it "shall be deemed to be" the same thing, it creates a legal fiction, and in that case "the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to[2] And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted[3]

A Full Bench of the Rangoon High Court has recently dissented from the above Bombay view and held that a person, who is punishable under a particular section of the Code read with s 114, is punishable not as an abettor but as a principal and is guilty of the substantive offence and not merely of abetment of that offence Heald, J, said 'I cannot read that section [114] otherwise than as meaning that such a person is more than an abettor and that he is in fact what is called in English law a principal in the second degree[4]

PRACTICE.

Ev[illegible]

(2)

(3)

It is necessary to prove acts which would constitute abetment if the accused was absent and then to show that the accused was present

Procedure —Same as that for the offence abetted

Abetment of offence punishable with death or transportation for life—if offence not committed.

. **115** Whoever abets the commission of an offence[1] punishable with death or transportation for life, shall if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ,

if act causing harm be done in consequence

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt[2] to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine

ILLUSTRATION

A instigates B to murder Z The offence is not committed If B had murdered Z he would have been subject to the punishment of death or transportation for life Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine , and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years and to fine

[1] *Kashia Antoo* (1907) 10 Bom L. R. 26, 177, *Atmaram*, (1907) 9 Bom. L. R. 651, 31 Bom. 480

[2] *Ex parte Walton*, (1881) 17 Ch. D 746, 756.

[3] *Mostyn v Fabrigas* (1774) 1 Cowp 161,

[4] *Maung Pe Kas*, (1929) 7 Ran. 329, 338, F B.

COMMENT.

This section punishes the abetment of certain offences which are either not committed at all, or not committed in consequence of abetment, or only in part committed.

Offence punishable with death only—see s. 303.

Offences punishable with death or transportation for life—see ss. 121, 132, 194, 302, 303, 305, 307 and 396.

Offences punishable with transportation for life—see ss. 121A, 122, 124A, 125, 128, 130, 131, 194, 222, 225, 226, 232, 238, 255, 304, 307, 311, 313, 314, 326, 329, 361, 371, 376, 377, 388, 389, 394, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474 and 477.

Three different states of fact may arise after an abetment:—

(1) No offence may be committed. In this case the offender is punishable under this section and s. 116 for the mere attempt to commit a crime.

(2) The very act at which the abetment aims may be committed, and will be punishable under ss. 109 and 110.

(3) Some act different, but naturally flowing from the act abetted, may be perpetrated, in which case the instigator will fall under the penalties of ss. 111, 112 and 113.

1. **'Offence'.**—This term here denotes a thing punishable under the Code or any special or local law (s. 40).

2. **'Hurt'.**—See s. 319, *infra.*

PRACTICE.

Evidence.—Prove that the offence abetted, though not committed in consequence, is one punishable with death, or transportation for life.

Procedure.—Not bailable; and see the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with death or transportation for life, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 115 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Abetment of offence punishable with imprisonment—if offence be not committed;

116 Whoever abets an offence[1] punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both;

if abettor or person abetted be a public servant whose duty it is to prevent offence.

and if the abettor or the person abetted is a public servant,[2] whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to

one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

ILLUSTRATIONS.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour *in the exercise of B's official functions B refuses to accept the bribe* A is punishable under this section

(*b*) A instigates B to give false evidence Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly

(*c*) A, a police officer, whose duty it is to prevent robbery, abets the commission of robbery Here, though the robbery be not committed, A is liable to one half of the longest term of imprisonment provided for that offence, and also to fine

(*d*) B abets the commission of a robbery by A a police officer, whose duty *it is to prevent that offence Here, though the robbery be not committed,* B is liable to be one half of the longest term of imprisonment provided for the offence of robbery, and also to fine

COMMENT.

This section provides for the abetment of an offence punishable with imprisonment There is no provision in the Code for punishing abetment of an offence punishable with fine only, e g , offences under ss 137, 154, 156, 278, 283 290 and 294A (second para)

1. 'Offence'.—This term here means a thing punishable under the Code or some local or special law (s 40)

2. 'Public servant'.—See s 21, *supra*

The enhanced punishment provided in the second clause of this section only applies to those public servants whose duty it is to prevent the commission of such offence Public servants not falling in this category will be dealt with under the firs [illegible] Where the accused was charged with having abetted the commission [illegible] the person abetted having [illegible] d by the [illegible] as not a public servant within the words of the section, [illegible] nt the commission of such offence'[1].

Illustration (*a*).—This illustration is only an example of abetment of an offence under s 161 There are many other ways of instigating a public servant to commit an offence under s 161 besides by means of a direct offer of a bribe[2].

CASE.

A Val [illegible] a letter to another Vakil of that Court, who [illegible] eto The purport of this letter, whicl [illegible] for circulation to Vakils practising ir [illegible] o whom it was addressed "could easily send his [illegible] unal," to the writer, who would conduct them in that Court And 'as a remuneration' the fees paid by the clients would be shared between the writer and the Vakil who had sent the cases It was held that that was incitement within the meaning of this section[3].

[1] *Ramnath Surma Biswas*, (1873) 21 W R. (Cr) 9 See *Rameshwar Singh*, (1924) 3 Pat 047

[2] *Amiruddin Salebhoy Tyabjee*, (1922) 24 Bom L. R. 534, *Vonu Ramchandraiah*, (1927) 53 M L. J 723, *Puran Singh*, (1928) 29 Cr L. J 601

[3] *Parbati Charan Chatterji* (1895) 17 All 498, F C

PRACTICE.

Evidence.—Prove that the offence abetted, though not committed, in consequence, is one punishable with imprisonment, or that the accused, or the person abetted, is a public servant; and that it was his duty to prevent the commission of such offence.

Procedure.—Same as for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with imprisonment, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 116 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Abetting commission of offence by the public or by more than ten persons.

117. Whoever abets the commission of an offence[1] by the public[2] generally or by any number or class of persons exceeding ten[3], shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ILLUSTRATION.

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

COMMENT.

Under this section it will be sufficient to shew any instigation or other mode of abetment, though neither the effect intended nor any effect follows from it. This section stood as clause 94 in the draft Code and contained another illustration as follows:—

"A inserts in a newspaper an article advising soldiers to shoot every commanding officer who uses them harshly. A has committed the offence defined in this clause."

1. **'Offence'.**—This term here denotes a thing punishable under the Code or some local or special law (s. 40).

2. **'Public'.**—This word includes any class of the public or any community (s. 12, *supra.*)

3. **'Any number or class of persons exceeding ten'.**—The offence abetted must have been intended to be committed by the public or by any number of persons exceeding ten collectively and conjointly[1]. Where, therefore, a person abetted twelve coolies to break their contracts, it was held that as each breach of contract was a separate and distinct offence, the abettor abetted twelve offences by twelve persons, and not one offence by twelve persons, and so was not punishable under this section[2]. Where the accused instigated people to become members of a Jatha which would be unlawful association within the meaning of s. 16 of the Criminal Law Amendment Act, it was held that his act came within the purview of this section[3].

[1] *Mihan Singh,* (1923) 1 Lah. C. 1.
[2] (1865) 3 W. R. (Cr.) 24.
[3] *Kirpal Singh,* (1925) 2 Lah. C. 19.

PRACTICE

Evidence.—Prove (1) abetment of the offence in question by the accused

(2) That such offence was to be committed by the public, or by more than ten persons

Procedure.—Same as that for the offence abetted

Charge.—I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows:—

That you on or about the ——day of——, at—— abetted the commission of an offence of——by——numbering more than ten persons by (*state the act done by the accused in instigation*) and thereby committed an offence punishable under s 117 of the Indian Penal Code and within my cognizance (*or the cognizance of the Court of Session*)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Concealing design to commit offence punishable with death or transportation for life

118 Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[1] punishable with death or transportation for life,

voluntarily[2] conceals[3], by any act or illegal omission[4], the existence of a design[5] to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed

shall if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or,

if offence be not committed.

if the offence be not committed, with imprisonment of either description for a term which may extend to three years and in either case shall also be liable to fine

ILLUSTRATION

A knowing that dacoity is about to be committed at B falsely informs the Magistrate that a dacoity is about to be committed at C a place in an opposite direction and thereby misleads the Magistrate with intent to facilitate the commission of the offence The dacoity is committed at B in pursuance of the design A is punishable under this section

COMMENT

Under s 107 concealment of a design to commit an offence constitutes an abetment There *must be an obligation on the person concealing the offence to* disclose it The concealment to be criminal must be intentional or at least with knowledge that it will facilitate the commission of an offence

This section and ss. 119 and 120 all contemplate the concealment of a design by persons other than the accused to commit the offence charged[1] These sections apply to the concealment of all offences except those which are merely punishable with fine They deal with concealment prior to the commission of an offence Sections 202 and 203 deal with subsequent concealment.

1 **Offence'**.—See s 40 *supra*

2 **Voluntarily**.—See s 39 *supra*

[1] *Pyroonji Pinery* (18[illegible]) I Ind [illegible] Bom [illegible] (O S) 10[illegible] *Khanda [illegible]* (1899) [illegible]

3. **'Conceals**.—A person cannot be punished if he is not legally bound to inform of the existence of a design and where he has not concealed the existence of the design by any overt act[1]. By s. 44 of the Criminal Procedure Code[2] every person whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under sections 121—126, 130, 143—145, 147, 148, 302—304, 382, 392—399, 402, 435, 436, 449, 450, 456—460 of the Indian Penal Code shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

4. **'Illegal omission'**.—See s. 43, *supra*. It must be shown that the omission was likely to facilitate the commission of an offence[3]. Concealment by illegal omission can be an offence only when the omission is by some person bound by law to make report of offences.

5. **'The existence of a design'**.—There must exist a design to commit at some future time an offence of the kind described, and no conviction should take place until the Court has sufficient proof that such a design existed.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That such offence was one punishable with death, or transportation for life.

(3) That the accused concealed the existence of such design (*a*) by his act or illegal omission; or (*b*) by his knowingly false representation.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate or knew that he would thereby facilitate, the commission of such offence.

(6) That the offence concealed has been committed (if the case falls under the first clause).

Procedure.—Not bailable, if the concealment is of an offence punishable with death or transportation for life and the offence is committed. Bailable, if the offence is not committed.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, with the intention of facilitating, or with the knowledge that you will thereby facilitate the commission of the offence of——(*specify the act*) (or omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 118 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Public servant concealing design to commit offence which it is his duty to prevent—

119. Whoever[1], being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[2] which it is his duty as such public servant to prevent,

1 *Bahadur*, (1882) P. R. No. 34 of 1882. See *Jhugroo*, (1865) 4 W. R. (Cr.) 2, where it is held that the knowledge of a design to comit dacoity, and voluntary concealment of the existence of that design with the knowledge that such concealment would facilitate the commission of dacoity do not amount to an abetment of dacoity.

2 Act V of 1898.

3 *Kesree*, (1866) 1 Agra 37.

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both,

if offence be committed

or if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years,

if offence be punishable with death etc

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both

if offence be not committed.

ILLUSTRATION

A an officer of police being legally bound to give information of all designs to commit robbery which may come to his knowledge and knowing that B designs to commit robbery, omits to give such information with intent to facilitate the commission of that offence Here A has by an illegal omission concealed the existence of B s design and is liable to punishment according to the provision of this section

COMMENT.

Section 118 deals with persons who are not public servants In this section the same principle is extended to public servants but with severer penalty Every omission on the part of a public servant to disclose a design to commit an offence which it is his duty to prevent will be punishable under this section

1 **'Public servant'** —See s 21, *supra* The section only applies to that class of public servants whose duty it is to prevent such offence

2 **'Offence'** —See s 40, *supra*

PRACTICE.

Evidence —Prove (1) the existence of the design to commit an offence

(2) That the accused was a public servant

(3) That it was the duty of the accused as such public servant, to prevent the commission of that offence

(4) That the accused concealed the existence of such design (*a*) by his act or illegal omission or (*b*) by his knowingly false representation

(5) That the accused did so voluntarily

(6) That the accused thereby intended to facilitate or knew that he would thereby facilitate the commission of such offence

(7) That the offence concealed has been committed (if the case falls under the first clause)

Procedure —Not bailable if the concealment is of an offence punishable with death or transportation for life Otherwise the procedure is the same as that for the offence abetted

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant, to wit——whose duty it was to prevent the commission of the offence of——with the intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of ——did (*specify the act*) (*or* omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 119 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Concealing design to commit offence punishable with imprisonment—

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[1] punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed;

if offence be not committed.

shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one fourth, and if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

COMMENT.

Section 118 deals with offences punishable with death or transportation for life: this section deals with offences punishable with imprisonment. The basic principle in both the sections is one and the same. All offences except those punishable with a fine are included in these two sections.

The illegal concealment by act or omission contemplated by this section has reference to the existence of a design on the part of third persons to commit an offence[1].

1. **'Offence.'**—See s. 40, *supra.*

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That such offence was punishable with imprisonment.

(3) That the accused concealed the existence of such design

(*a*) by his act or illegal omission, or

(*b*) by his knowingly false representation.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

If the case falls under the first clause, prove

(6) That the offence concealed has been committed.

Procedure.—Same as for the offence abetted.

Charge.—See s. 118, *supra.*

[1] *Rajcoomar Banerjee,* (1862) 1 Ind. Jur. (O. S.) 105.

CHAPTER V-A.

CRIMINAL CONSPIRACY.

Definition of criminal conspiracy

120 A When two or more persons agree[1] to do, or cause to be done,—

(1) an illegal act[2], or

(2) an act which is not illegal by illegal means[3], such an agreement is designated a criminal conspiracy

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement[4] in pursuance thereof

Explanation —It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object

COMMENT.

This chapter has introduced into the criminal law of India a new offence namely, the offence of criminal conspiracy It was introduced by the Criminal Law Amendment Act[1] Conspiracy is a substantive offence and has nothing to do with abetment

Conspiracy differs from other offences in this respect, that in other offences [illegible]

do some act, no matter whether it is done or not[2]

Object.—The Statement of Objects and Reasons stated — The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and s 121A of that Code Under the latter provision it is an offence to conspire to commit any of the offences punishable by s 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof, or to overawe by means of criminal force or the show of criminal force, the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof Under s 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing In other words, except in respect of the offences particularized in s 121A, conspiracy *per se* is not an offence under the Indian Penal Code

On the other hand by the common law of England if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree, commit the offence of conspiracy In other words conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means and the parties to such a conspiracy are liable to indictment

[1] VIII of 1913.

[2] *Amrita Lal Hazra,* (1914) 42 Cal 957; *Gulab Singh* (1916) 14 A. L. J.

"Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in s. 121A of the Indian Penal Code, and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both"[1].

Scope.—The section is not applicable to offences committed before it came into force[2].

Ingredients.—The ingredients of this offence are—

(1) That there should be an agreement between the persons who are alleged to conspire; and

(2) That the agreement should be:—

(*i*) for doing of an illegal act, or

(*ii*) for doing by illegal means an act which may not itself be illegal[3].

To constitute a criminal conspiracy there must be an agreement of two or more persons, to do an act which is illegal or which is to be done by illegal means. The object in view or the methods employed should be illegal, as defined in s. 43, *supra*. A distinction is drawn between an agreement to commit an offence, and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, that is, there must be an overt act.

1. 'Agree'.—The gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not[4]. A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means[5]. When one of the two accused is acquitted of the charge under ss. 120B and 302, the other cannot be convicted of the charge[6]. Where the conspiracy alleged in the charge is one in which only three persons are said to have been participators and two of them are acquitted, the other is entitled to an acquittal as a matter of course[7].

2. 'Illegal act'.—The word "illegal" is defined in s. 43.

Where a person is aware of the fact that a large amount of jewellery has been handed over by a lady to another person in order that he might deposit it for safe custody in a bank and of the fact that that person has pawned that jewellery and kept the proceeds, but not only does the person, who is aware, not inform the lady whose property has been misappropriated of the fact, although he is married to her grand-daughter but he tells her deliberate untruths upon the subject, the correct finding to be arrived at in these circumstances is that both those men were engaged in a criminal conspiracy[8].

1 Gazette of India, 1913, Part V., p. 44.
2 *Monmohan Roy*, (1915) 20 C. W. N. 292.
3 *Chandiram*, (1925) 27 Cr. L. J. 286.
4 *O'Connell*, (1844) 11 Cl. & F. 155, 233.
5 *Amrita Lal Hazra*, (1914) 42 Cal. 957.
6 *Osman Sardar*, (1923) 39 C. L. J. 264; *Kasem Ali*, (1926) 45 C. L. J. 204.
7 *Prafulla Kumar*, (1925) 30 C. W. N. 94.
8 *Muhammad Hadi Husain Mirza*, (1928) 3 Luck. 494.

3 **'Illegal means'.**—An agreement to effect something which in itself may be indifferent or even lawful by unlawful means amounts to conspiracy[2]. A woman, who believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion[2]

4 **'Unless some act besides the agreement is done by one or more parties to such agreement'** —When the agreement is not for commission of an offence an overt act in pursuance of the conspiracy is necessary The law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to the intention The overt act in a case of conspiracy consists in the agreement of the parties to do an unlawful act or to do a lawful act by unlawful means[3]

120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy[1], be punished in the same manner as if he had abetted such offence

Punishment of criminal conspiracy

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both

COMMENT.

An offence under this section consists in the conspiracy without any reference to the subject matter of the conspiracy and it is not necessary to establish the offence that there must have been some definite property about which the parties are negotiating or which they have conspired to possess[4]

Under this section the punishment for a criminal conspiracy is more severe if the agreement is one to commit a serious offence, it is less severe if the agreement is to commit an act which, although illegal is not an offence punishable with death, transportation, or rigorous imprisonment for more than two years

Sub-section (2) does not apply to Trade Unions (vide s 17 of the Indian Trade Unions Act XVI of 1926

1 **'Where no express provision is made in this Code for the punishment of such a conspiracy'.**—These words do not mean that where there is proof of an abetment of an offence, the charge should be for such abetment It is optional for the Crown to proceed for abetment of an offence committed in pursuance of the conspiracy or of the offence of conspiracy[5]

PRACTICE

Evidence —Prove (1) that the accused agreed to do or caused to be done an act

(2) That such act was illegal or was done by illegal means

Where the act itself is not illegal prove further

[1] *O'Connell* (1844) 11 Cl & F 155 233.
[2] *Whitchurch* (1890) 24 Q B. D 420.
[3] *Nirmal Chandra De* (1925) 31 C. W N 239
[4] *Ibid*
[5] *Amirchand*,

(3) That some overt act was done by one of the accused in pursuance of the agreement.

The gist of the offence is the agreement itself, and where the object of the agreement is to do an unlawful act, and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object[1].

On a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it. Before evidence is let in under s. 10 of the Evidence Act, the defence is entitled to insist upon proof of reasonable ground for belief that the persons named in the charge have conspired together[2]. Though general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the accused took part in it, it does not mean that conspiracy cannot be proved by circumstantial evidence only and that general evidence must be given[3]. In cases of conspiracy direct evidence will be seldom forthcoming and it is necessary to look at the circumstances to see whether the conspiracy actually existed[4]. A cipher code of revolutionary significance is good evidence that the persons named therein have conspired to commit an offence. Such a cipher code is substantive evidence of conspiracy[5].

In cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from other facts proved in the case[6]. A conspiracy need not be established by evidence of an actual agreement between the conspirators and overt acts raise a presumption of an agreement and knowledge of the purpose of the conspiracy. The connection has to be established with the conspiracy and not with the separate acts of different conspirators which are the over acts of the different individuals in proof of the conspiracy[7].

Overt acts may properly be looked at as evidence of the existence of a concerted intention and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt act[8].

Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, it was held that the Court ought to infer a conspiracy to manufacture arms[9].

Where the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence[10].

The testimony of persons who have been members of a criminal conspiracy or else have joined it for the purpose of betraying its secrets must be very carefully scrutinised and much weight cannot be attached to it unless it is corroborated by other circumstances[11].

Procedure.—If the offence falls under clause (1)—Cognizable, if the offence which is the object of the conspiracy is cognizable, but not otherwise—Warrant or Summons, as the offence for which conspiracy is entered into—Bailable, if the

1 *Haji Samo*, (1926) 22 S. L. R. 91, 28 Cr. L. J. 426.
2 *Amrita Lal Hazra*, (1914) 42 Cal. 957.
3 *Abdulla*, (1926) 21 S. L. R. 244, 28 Cr. L. J. 421.
4 *Gour Chandra Das*, (1928) 33 C. W. N. 1004.
5 *Indra Chandra Narang*, (1929) 30 Cr. L. J. 646, F.B.
6 *Khagendra Nath Chaudhuri*, (1914) 19 C. W. N. 706.
7 *Bishambhar Nath*, (1925) 2 O. W. N. 760; *Kishanchand*, (1925) 27 Cr. L. J. 243; *Haji Samo*, (1926) 22 S. L. R. 91, 28 Cr. L. J. 426.
8 *Pulin Behari Das*, (1911) 16 C. W. N. 1105, 15 C. L. J. 51.
9 *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153.
10 *Kali Das Basu*, (1915) 39 C. L. J. 151.
11 *Pulin Behari Das*, (1911) 16 C. W. N. 1105, 15 C. L. J. 517.

offence which is the object of the conspiracy is bailable, otherwise not—Not compoundable—Court of Session if the offence which is the object of the conspiracy is triable exclusively by such Court in the case of all other offences, Court of Session, Presidency Magistrate or Magistrate of the First Class

If the offence falls under clause (2)—Warrant—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the First Class

In cases of indictment for conspiracy, when two persons are indicted and are tried together either both must be convicted or both must be acquitted Where, therefore, three persons were charged with having entered into a conspiracy, and two of them were acquitted, the third person could not be convicted of conspiracy, whether the conviction be upon the verdict of a jury or upon his own confession[1]

Once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy It is not an irregularity or an improper exercise of discretion in putting in the form of charges specific acts specially relied on as against each individual accused to show that they joined in the conspiracy Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy may be proved[2]

Sanction—Sanction of the Local Government is necessary before instituting proceedings under this section[3]

Charge—I (*name and office of Magistrate, etc*) hereby charge you (*name of the accused*) as follows —

That you, on or about the——day of——, at——, agreed to do (*or* caused to be done) [an illegal act, to

and that same act, viz ,——,

committed an offence punish

within my cognizance [or the cognizance of the Court of Session (*or* High Court])

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

was an agreement to do an act in violation of the law[4]

When two or more persons have conspired together for committing some offence, and one or more of them have committed that offence in pursuance of the conspiracy but others have not, it is permissible to charge and try them together for the conspiracy as also for the substantive offence[5]

A charge under this section is not bad because it states no definite date on which the accused agreed, or the names of persons in respect of whom the conspirators agreed to commit an offence[6]

Punishment—The punishment awardable under this section varies according as the offence has or has not been committed in consequence of the conspiracy If an offence has been committed, the punishment is that provided by s 109 of the Code, though, strictly speaking there should not be a conviction in such cases of conspiracy but of abetment If it has not been committed, the punishment is

[1] *Gulab Singh* (1916) 14 A L J 680 *Balmokand* (1915) P R No 17 of 1915, *Osman Sardar* (1923) 39 C L J 264

[2] *Abdul Salim* (1921) 35 C L J 279 26 C W N 680 *Billinghurst v Blackburn*, (1923) 27 C W N 821

[3] Criminal Procedure Code s. 196-A; *Ali Mia* (1906) 54 Cal 155

[4] *Amrita Lal Hazra*, (1914) 42 Cal 957

[5] *Ibid*

[6] *Balmokand*, (1915) P. R. No. 17 of 1915.

governed by s. 116 of the Code[1]. Where, for instance, there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under this section read with s. 19(*a*) of the Arms Act and s. 116 of the Code. and the maximum term of imprisonment awardable under these sections is nine months' rigorous imprisonment[2].

The offence of conspiracy is a separate offence from the offence of participation *in a particular dacoity or the dishonest reception of property stolen in a* dacoity knowing it to be stolen. Separate sentences can be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence of participation in conspiracy[3].

[1] *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153; *Khagendra Nath Choudhuri*, (1914) 19 C. W. N. 706; *Balmokand*, (1915) P. R. No. 17 of 1915.

[2] *Ibid.*

[3] *Hazari Beria*, (1928) 5 O. W. N. 985, 987.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE

Waging, or attempting to wage war or abetting waging of war against the Queen

121. Whoever[1] wages war[2] against the Queen[3], or attempts to wage such war, or abets the waging of such war[4], shall be punished with death or transportation for life and shall also be liable to fine

ILLUSTRATIONS

(*a*) A joins an insurrection against the Queen A has committed the offence defined in this section

(*b*) A in India abets an insurrection against the Queen s Government of Ceylon by sending arms to the insurgents A is guilty of abetting the waging of war against the Queen.

COMMENT

Principle—The section embraces every description of war whether by insurrection or invasion, or war beyond our territories and complicity in an abetment of insurrection, invasion or foreign war and further a British subject residing in British territory, who abets the waging of war against the British Government outside British territory, is guilty, *no matter* whether the British Government takes the initiative and invades the hostile territory or awaits the attack of the enemy, or whether the persons waging war are foreigners or persons owing allegiance to the Queen[1]

To constitute this offence no specified number of persons is necessary[2] 'There is a difference,' says Foster,[3] 'between those insurrections which have carried the appearance of an army formed under leaders and provided with military weapons, and with drums, colours, etc, and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned I do not think any great stress can be laid on that distinction It is true that in case of levying war the indictments generally charge that the defendants were armed and arrayed in a warlike manner and where the case would admit of it, the other circumstances of swords, guns drums colours etc, have been added But I think the merits of the case have never turned singly on any of these circumstances In the cases of *Damaree* and *Purchase* there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising, and yet the

take revenge on *particular* persons, the statute of treasons hath already determined that point in favour of the subject . Upon the same principle and within the reason and equity of the statute, risings to maintain a *private* claim of right, or to destroy *particular* inclosures, or to remove nuisances, which affected or were thought

1 *Mahomed Shuffee*, All Unrep

2 3 Coke's Inst 9

3 Crown Cases 208, 209 210

to affect in point *of interest the parties assembled for these purposes*, or to break prisons in order to release *particular* persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute."

The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war against the King, under this section, are offences against the Penal Code only, and are not treason or misprision of treason[1]. Compare Act XI of 1857, S. 1.

1. **'Whoever.'**—The authors of the Code say:—"The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, etc., or temporary as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question"[2].

2. **'Wages war.'**—These words "seem naturally to import a levy of war by one who throwing off the duty of allegiance arrays himself in open defiance of his sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm"[3]. There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature[4].

The word "wages" has the same meaning as "levying" used in the English statute. In *Gordon's* case[5] Lord Mansfield said: "There are two kinds of levying war:—One against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors:—the other, which is said to be levied against the majesty of the king, or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the king; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government; and by force of arms, to restrain the king from reigning according to law."

"Every insurrection which in judgment of law is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from about him,—these risings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not: and every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King's death...

"Insurrections in order to throw down *all* inclosures, to alter the established law or change religion, to inhance the price of *all* labour or to open *all* prisons,—all risings in order to effect these innovations of a *public and general concern by an armed force* are, in construction of law, high treason, within the clause of levying war: for though they are not levelled at the person of the King, they are against *his Royal Majesty;* and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and Government too, by numbers and an armed force. Insurrections likewise for redressing *national* grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils *of a public nature and in which the insurgents have no special interest*,—risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war: for they are levelled at the King's Crown and Royal Dignity"[6].

1 *Amiruddin*, (1871) 7 Beng. L. R. 63.
2 2nd Rep. s. 13.
3 *Ibid*, s. 10.
4 *Frost*, (1839) 9 C. & P. 129, 4 St. Tr. (N. S.) 85.
5 (1784) 21 St. Tr. 486, 644.
6 Foster on Crown Cases, pp. 210, 211; *Gordon Trials*, (1784) 21 St. Tr. 486, 490; *Kunhi Kadir*, (1921) 15 L. W. 311, 30 M. L. T. 125.

An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum* Lifting and marching are sufficient overt acts without coming to a battle or action[1]

No amount of violence, however great and with whatever circumstances of a warlike kind it may be attended will make an attack of one subject on another high treason On the other hand, any amount of violence however insignificant, directed against the King will be high treason and as soon as violence has any political object it is impossible to say that it is not directed against the King in the sense of being armed opposition to the lawful exercise of his power[2] When the object of a mob is not mere resistance to the District Magistrate but the total subversion of the British power and the establishment of the Khilafat Government, a [illegible] ty of waging war[3] [illegible] itting of a great nc [illegible] or four or more do rise to burn or put down an enclosure in Dale which the lord of the Manor in Dale hath made there in that particular place this or the like is a riot a rout or an unlawful assembly and no treason But if they had risen of purpose to alter religion established within the realm or laws or to go from town to town generally and to cast down enclosures this is levying of war (though there be no great number of the conspirators within the purview of this Statute) because the pre [illegible] ages war in this [illegible] to wage war or the collection of men arms and ammunition for that purpose is not waging war[5]

3 **'Against the Queen'** —The word 'Queen denotes the sovereign for the time being of the United Kingdom of Great Britain and Ireland (s 13)

4 **'Abets the waging of such war'** —It is not essential that as a result of the abetment the war should be waged in fact But the main purpose of the instigation should be the waging of the war It should not be merely a remote and incidental purpose but the thing principally aimed at by the instigator The mere fact that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section but the Court ought to be satisfied that he has instigated the waging of war i e the use of violence for the purpose of effecting innovations of a general and public nature[6]

The authors of the Code say We have made the abetting of hostilities against the Government in certain cases a separate offence instead of leaving it to the operation of the general law laid down in the chapter on abetment We have done so for two reasons In the first place war may be waged against the Government by persons in whom it is no offence to wage such war by foreign princes and their subjects Our general rules on the subject of abetment would apply to the case of a person residing in the British territories who should abet a subject of the British Government in waging war against that Government but they would not reach the case of a person who while residing in the British territories should abet the waging of war by any foreign prince against the British Government In the second place we agree with the great body of legislators in thinking that though in general a person who has been a party to a criminal design [illegible]

[1] Foster 218

[2] Stephen's History of Criminal Law of England, Vol II p 2[illegible] Foster 208, 211

[3] Ambi Kadir (1921) 30 M. L. T 125, 35 L. W 311

[4] *Stroke* 3 Inst. 9

[5] *Barindra Kumar Ghose* (1909) 37 Cal 467

[6] *Hamat Mohans*, (1922) 24 Bom. L. R. 8[illegible] 6 Bom. Cr C. 235.

most heinous and formidable state-crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have therefore not thought it expedient to leave such plots and preparations to the ordinary law of abetment....Under that general law, a conspiracy for the subversion of the Government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions and interchange promises of fidelity. A conspiracy for the subversion of the Government, which should be carried as far as the gunpowder treason or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged cheque. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great state offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law"[1]. It may be noted in view of the last sentence that s. 121A which deals with conspiracies was added to the Code subsequently.

Under the English law, mere words spoken or written, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King or the levying of a war against him and in the contemplation of the speaker, do not amount to treason. Under the Penal Code, the waging or levying of a war and the abetting of it are put upon the same footing by this section. That is, the abetting of the waging of war is under the Code as much an offence of treason as the waging of war itself.

According to the general law as to abetment (s. 108, Expln. 2), to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. This applies to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, this section does away with that distinction so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever[2].

The word "abets" in this section does not mean something less than that word as used in s. 107. The abetment contemplated under the former section need not be abetment of some war in progress; there may be and usually is instigation of rebellion before rebellion actually begins: instigation of this kind is abetting the waging of war against the King. So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore of abetting the waging of war[3].

The accused published a book of poems where in a spirit of blood-thirstiness and murderous eagerness directed against the Government and "White" rulers ran through the poems; the urgency of taking up the sword was conveyed in unambiguous language; and an appeal of blood-thirsty incitement was made to the people to take up the sword, form secret societies, and adopt guerilla warfare for the purpose of rooting out "the demon" of foreign rule. It was held that the

[1] Note C, p. 119.
[2] *Ganesh Damodar Savarkar*, (1909) 12 Bom. L. R. 105, 116.
[3] *Ibid*, pp. 119, 120.

poems conveyed to readers an instigation to wage war, and that the offence of abetting the waging of war was committed[1]

Inducing or assisting subjects of a State at war to return to their own country after declaration of war will amount to abetment[2].

If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, he gives aid and comfort to the King's enemies within the meaning of the Treason Act[3] The United Kingdom being at war with Germany, a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners of war in Germany to join the armed forces of the enemy, and took part in an attempt to land arms and ammunition in Ireland for the use of the enemy, it was held that he was guilty of high treason[4] Such conduct will amount to abetment under this section

Constructive levying of war.—"Constructive levying of war is in truth more directed against the Government than the person of the king, though in legal construction it is a levying of war against the king himself This is when an insurrection is raised to reform some national grievance, to alter the established law or religion, to punish magistrates, to introduce innovation of a public con[illegible] of some general law by an armed force or for any [illegible] nt in matters of a public and general [illegible] on the Court of King's Bench declared [illegible] by intimidation and violence to force the repeal of a law, was a levying war against the king The statute in question was the 18 Geo III, c 60, for relieving Roman Catholics from certain penalties and the treasonable act given in evidence against the prisoner was the assembling a great multitude of people, and encouraging them to surround the two houses of parliament and commit different acts of violence there and elsewhere, with a view to intimidate them to a repeal of the statute Insurrections of this nature, though not levelled directly against the person of the king are yet an attack upon his regal office, and tend to dissolve all government, society, and order The king is bound in duty to enforce the acts of the legislature and uphold their authority any resistance, therefore, to these, must, in its consequences, extend to the endangering of his person and government, by involving the state in a general distraction, on which account this species of treason falls properly within the [illegible] Of the same nature is an assembling together [illegible]

insurgents have no [illegible] sheriffs, and indeed all private persons, may use force to suppress [illegible] any special commission, in the same manner as they may oppose foreign enemies coming hostilely into the kingdom'[4].

Foreigners.—All persons owing allegiance to the Sovereign may be guilty of this offence, but not foreigners, [illegible] Indian Legislature has no power to make [illegible] a foreign State by which war is lawfully wa[illegible] than the

[1] *Ganesh Damodar Savarkar*, (1909) 12 Bom L R 105

[2] See *Ahlers* [1915] 1 K B 616.

[3] *Casement* [1917] 1 K B 98.

[4] *Ibid*

[5] 1 East P C Chap 2, s 17 To the same effect is Foster, Cr C, 208 211 cited in *Lord Gordon's case* [illegible] Tr

meaning of the section. But foreigners owing local allegiance are within the section[1].

Jurisdiction.—Where the prisoner was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Session at Patna had jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hundis, and, until that money reached its destination, the sending continued on the part of the prisoner[2].

Amendment.—The words "also be liable to fine" were substituted for the words "forfeit all his property" by Act XVI of 1921, s. 2.

CASES.

The accused was seen in the front rank of a crowd of two or three thousand persons which attacked a force of police and military with swords, knives and bludgeons. The police had to fire in self-defence and it was only after nine persons were killed and three wounded that the mob retreated. The accused was then arrested and at his direction the mob dispersed. The accused had for some time previously been engaged in a propaganda to the effect that no revenue should be paid to the Government and that people should non-co-operate with it. The accused had also been setting up a mock Court of Justice. On the morning of the occurrence the accused had addressed a meeting saying that those present should subvert the British Raj and establish the Khilafat Government and that all Government offices, Railways and telegraphs must be destroyed. In the crowd there was carried by the side of the accused a flag in the front of the mob in which there was the following inscription: "God the greatest. The Khilafat go to work light-mindedly and you will certainly succeed and God will be with you." It was held that the accused was guilty of the offence of waging war against the King[3].

The accused delivered a speech in support of his plea for a change in the wording of the aims and objects of the Muslim League, viz., "the attainment of Swaraj by the people of India by all peaceful and legitimate means," by substituting the words "possible and proper" for the words "peaceful and legitimate." In the course of the speech, he advocated the immediate starting of a parallel Government independent of all British control, by setting up on a separate and permanent foundation Courts, schools, art, industry, commerce, army, police and national parliament, with a view to obtain Swaraj. The speaker contemplated the present establishment of the above by peaceful and non-violent means; but he dipped into the future and foresaw that if the British Government resorted to repression and martial law, he apprehended that the Mahomedans at least would carry on guerilla warfare or in the words of the koran "kill them whenever you find them." He further developed the point by stating: "So long as the Government confines to the use of chains and fetters non-co-operation can remain peaceful as it is to-day, but if things go further and Government has recourse to gallows or machine guns it will be impossible for the movement to remain non-violent." It was held that the main theme of the speech having been the change in the aims and objects of the League and the immediate starting of a parallel Government, the accused had committed no offence under this section which required a clear and direct incitement to action as distinguished from a state of mind[4].

1 M. & M. See *Lynch*, [1903] 1 K. B. 444, where a British subject joined the Boers to fight against the British.
2 *Amir Khan*, (1871) 9 Beng. L. R. 36.
3 *Umayyathantagath Puthen*, (1922) 15 L. W. 311.
4 *Hasrat Mohani*, (1922) 24 Bom. L. R. 885.

The District Magistrate of a district marched to a place called Tirarangadi with a posse of soldiers and reserve police to arrest certain Khilafat leaders Next [illegible] of Mopillas were marching [illegible] puty Inspector General took [illegible] One and a half miles from Tirarangadi they saw a big mob fifty yards away. The Deputy Superintendent went forward and ordered the mob to disperse but it came straight on in regular formation [illegible] re were twenty four swords [illegible] of the police fired their gun [illegible] who had weapons dropped them The accused was seen in front of the mob with a stick. It was held that it was doubtful whether the part taken by the accused could be said to be waging war under this section[1]

PRACTICE.

Evidence.—Prove (1) that the accused waged war, or attempted to do so, or abetted the same

(2) That such war was against the King Emperor

It is not incumbent on the accused to shew what the object and meaning of the acts done was, but it is the duty of the prosecutors to make out their case against the accused[2]. In a case in which the accused was charged with abetting the waging of war against the Queen it was held that the *Calcutta Gazette* and the *Gazette of India* were admissible in evidence to prove the proclamation and official communications of the Government relating to the war[3]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Sanction—Sanction of Government is necessary before prosecution could be instituted under this section[4]

Where an order under s 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss 121A, 122, 123 and 124 of the Penal Code, *"or under any other section of the said Code which may be found applicable to the case,"* and the examination of the complainant also referred to the same sections, it was held that no complaint under this section was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter, nor did [illegible]

[illegible] its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect An order authorizing a complaint under certain specified section *"or under any other section found applicable"* if it means found by any one other than Government, involves a delegation which cannot be sustained[6]

The sanction of the Local Government must be strictly proved in the manner laid down in s 78 of the Evidence Act, and the identity of the accused with the person named in the sanction must be established[7].

[1] *Palathingal Lalu v. Perilakkal*, [1921] M W N 518

[2] *Frost*, (1839) 9 C. & P. 129

[3] *Ameeroddeen* (1871) 15 W R (Cr) 25

[4] Criminal Procedure Code s. 196

[5] *Barindra Kumar Ghose*, (1909) 37 Cal 467; *Bal Gangadhar Tilak*, (1897) 22 Bom 112, dissented from

[6] *Barindra Kumar Ghose*

[7] *Amir Is*, (1880) S. [illegible]

In enacting this section, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against it may be commenced as in the case of the English statute[1].

Joinder of charges.—Charges under ss. 121A, 122 and 123 can be joined together[2].

The waging of war is a continuing offence and a charge against the accused under this section, specifying more than three offences committed in the course of the war, and spread over a period of more than one year, does not contravene the provisions of s. 131 of the Code of Criminal Procedure, and is not illegal[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused person*) as follows:—

That you, on or about the ——day of——, at——, waged war (*or* attempted to wage war, *or* abetted the waging of war) against His Majesty the King-Emperor of India, and thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session (*when the charge is framed by a Presidency Magistrate, for* Court of Session *substitute* High Court).

And I hereby direct that you be tried by the said Court on the said charge[4].

Conspiracy to commit offences punishable by section 121.

121 A. Whoever[1] within or without British India[2] conspires[3] to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India[4], or of any part thereof, or conspires to overawe, by means of criminal force[5] or the show of criminal force, the Government of India[6] or any Local Government[7], shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

COMMENT.

Object.—This section provides for the offence of conspiring to wage war against the King. Before this section was introduced[5] such a conspiracy was punishable only when it amounted to an abetment, that is, when an act or illegal omission took place in pursuance of that conspiracy. The present section immensely tightens the grip of the law on treasonable combinations. It is similar to the Treason-Felony Act[6] passed in 1848.

It was thought right to make the offence of conspiring by criminal force, or by show of criminal force, more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this, that persons who, by conspiring to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly.

The essence of an offence under this section is the agreement to do all or any of the unlawful acts mentioned in the section[7].

1 *Ameeroddeen*, (1871) 15 W. R. (Cr.) 25, 27.
2 *Barindra Kumar Ghose*, (1909) 37 Cal. 467.
3 *Gam Mallu Dora* (1924) 49 Mad. 74.
4 Criminal Procedure Code, Sch. V, No. xxviii (1).
5 Act XXVII of 1870, s. 4.
6 11 & 12 Vic., c. 12, s. 3.
7 *Nilakanta*, [1912] M. W. N. 207.

The provisions of the section are comprehensive and no formidable elements either in men or means are required to satisfy the definition of a conspiracy to wage war No act or illegal omission is necessary for such a conspiracy, the mere agreement of two or more being sufficient The determination of the Court in any case that a conspiracy to wage war has been established may not therefore necessarily imply the existence of a serious menace to the constitution or the stability of constituted authority in India

Chapters IV, V and XXIII apply to this offence[1].

Ingredients.—The section deals with two kinds of conspiracies —

1 Conspiring within or without British India (*a*) to commit any of the offences punishable by s 121, or (*b*) to deprive the King of the sovereignty of British India or any part thereof

2 Conspiring to overawe by means of criminal force, or the show of criminal force, the Government

1. 'Whoever.'—See s 121 When people take part, however little, in committing this offence, the fact that they were foolish or ignorant does not mitigate the offence[2].

2. 'British India.'—See s 15, *supra*

3. 'Conspires '—See s 107, *supra*. A conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means It consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means[3]. The explanation to this section says that to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof[4]

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another An accused not shewn to be a member of the conspiracy charged is entitled to demand an acquittal however bad his record may be and however much he may be suspected of this or that offence[5] Association for music, gymnastic exercises and fencing with sticks amongst young men living in the same village or attending the same school are ordinary incidents of village or school life, and could hardly with propriety be proved as forming elements in any alleged scheme or conspiracy to wage war against the King Emperor, and all the more so when they are shewn to have been accompanied by a complete absence of secrecy and rather by a courting of publicity[6]

If a conspirator has formed the intention to leave a conspiracy and ceases to be a conspirator by his own act and intention when the other conspirators wage war, he cannot be held guilty[7].

4. 'To deprive the Queen of the sovereignty of India'.—This expression corresponds to the clause "to deprive or depose him (King) or them (his successors) from the style, honour or the King's name of the Imperial Crown of this realm or of any other of His Majesty's dominions or countries," existing in the English Statute against conspiracies[8].

5. 'Criminal force'.—See s. 350, *infra*.

6. 'Government of India'.—See s. 16, *supra*.

[1] Act XXVII of 1870 s. 13.
[2] *Aga Khow* (1907) 1 B L T 27
[3] *Barindra Kumar Ghose*, (1909) 37 Cal. 467
[4] *Lalit Mohan Chuckerbutty* (1911) 38 Cal. 559, F.B., *Nilakanta*, (1912) M W N 207
[5] *Noni Gopal Gupta* (1911) 15 C. W. N. 593 594 (sub nom.) *Lalit Mohan Chuckerbutty* (1911) 38 Cal. 559, F.B.
[6] *Ibid.*
[7] *Geman Saya*, (19 ... L. R
[8] 36 Geo. III, -

7. **'Local Government'.**—See s. 3 (29) of the General Clauses Act (X of 1897).

Amendment.—The words "and shall also be liable to fine" were added by Act XVI of 1921, s. 3.

PRACTICE.

An indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offence, in ordinary and concise language, with as much certainty as the nature of the case will admit[1].

Evidence.—Prove (1) that the accused had entered into a conspiracy. Though to establish a charge of conspiracy there must be an agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement be proved[2].

(2) That the conspiracy was to commit an offence punishable under s. 121 *or* to deprive the King-Emperor of the sovereignty of Brititih India *or* to over-awe by means of criminal force or show of criminal force the Government of India or any Local Government.

With reference to evidence admissible as part of the *res gestæ* in prosecutions for conspiracy, or generally of an offence committed by confederates, it is an established rule that any act done by one of the party in pursuance of the original concerted plan and with reference to this common object, is, in the contemplation of the law, the act of the whole party[3].

If it be intended to give in evidence against the accused the acts of any other person it must be shewn that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties and so prove the conspiracy.

When persons have been taken into custody and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy, that is, when, so far as they are concerned, the conspiracy has come to an end, the act of persons who were members of the conspiracy and who are still free to act in pursuance thereof, are not admissible as against them; these acts can no longer be deemed the acts of co-conspirators.

There is a distinction between persons who enter into a conspiracy for the sole purpose of detecting and betraying it, and others who concur fully in the criminal designs for a time and join in their accomplishment, till, from alarm, or from some other cause, they turn upon their former associates and give information against them. These latter persons may be truly called accomplices. There is not on the part of such persons an original purpose of discovering the secret designs of the conspirators and of disclosing them for the benefit of the public, which is the vital elements in this class of cases.

The prosecution is not obliged to prove that the persons accused actually met and laid their heads together and after a formal consultation came to an express agreement to do evil. On the contrary, if the facts as proved are such that the jury as reasonable men can say there was a common design and the prisoners

1 *Pulin Behary Das,* (1912) 14 C. L. J. 517, 16 C. W. N. 1105.

2 *Barindra Kumar Ghose,* (1909) 37 Cal. 467.

3 See Indian Evidence Act, 1872, s. 10.

were acting in concert to do what is wrong, that is evidence from which the Jury may suppose that a conspiracy was actually formed

It is from this point of view that overt acts may properly be looked to as evidence of the existence of a concerted intention, indeed, the conspiracy is usually closely bound up with the overt acts, because, in many cases, it is only by means of the overt acts that the existence of the conspiracy can be made out But the criminality of the conspiracy is independent of the criminality of the overt acts

It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to conspire

The criminality of the conspiracy lies in the concerted intention, and once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of its object are evidence against each of the others, and this, whether such acts were done before or after his entry into the combination, in his presence, or in his absence[1]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

[illegible] charged with con[illegible]ist be convicted or [illegible]eged to have been members of a secret society, with its headquarters in Maniktolla in the suburbs and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others, known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war it was held that the joint trial of the accused on charges under s 121, this section and ss 122 and 123 was not bad for misjoinder of persons or charges[2]

Sanction.—No Court shall take cognizance of an offence under this section unless the prosecution is instituted under the authority of Government[3]

The requirement of law that complaint under the section should not be made without special authority from Government is no doubt due in part to the fact that a charge framed in terms of that section is calculated to produce an impression that a political situation of the gravest character has arisen[4]

Charge.—Where the accused were charged with having conspired with one another and other persons known and unknown to wage war against His Majesty it was held that the charge could not be sustained if the known persons were not mentioned in it[5].

The charge should run thus —

I (*name of office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows —

That you on or about the——day of——, at——(*if the place is without British India mention so*) conspired to wage war (*or* to abet the waging of war) against His Majesty the King Emperor, (*or* conspired to deprive the King Emperor of the Sovereignty of British India or of some part thereof, *or* conspired to overawe by means of criminal force or show of criminal force the Government of India etc,) and thereby committed an offence punishable under s 121A of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

[1] *Pulin Behary Das* (1912) 15 C L J 517, 16 C W N 1105

[2] *Barindra Kumar Ghose*, (1909) 37 Cal 467

[3] Criminal Procedure Code, s 196

[4] *Nani Gopal Gupta*, (1911) 15 C W N 593 (sub nom) *Lalit Mohan Chuckerbutty* (1911) 38 Cal 559 s n

[5] *Lalit Mohan Chakravarty* (1910) 15 C W N 98

Collecting arms, etc., with intention of waging war against the Queen.

122. Whoever[1] collects men, arms or ammunition or otherwise prepares[2] to wage war with the intention of either waging or being prepared to wage war against the Queen[3], shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

This section is intended to put down with a heavy hand any preparation to wage war against the King-Emperor. The acts made punishable by this section cannot be considered attempts: they are in truth preparation made for committing the offence of waging war. This is the only section in the Code in which preparation to commit an offence is made punishable. Preparation is a stage prior to an attempt. See s. 511, *infra*, for a discussion of the terms 'attempt' and 'preparation.'

1. **'Whoever'.**—See s. 121, *supra*.

2. **'Or otherwise prepares'.**—Any kind of preparation for waging war, e.g., making or strengthening a fort.

3. **'The Queen'.**—See s. 13, *supra*.

Amendment.—The words "also be liable to fine" were substituted for the words "forfeit all his property" by Act XVI of 1921, s. 2.

PRACTICE.

Evidence.—Prove (1) that the accused collected men, arms, etc.

(2) That he did collect men, arms, etc., with intent to wage war, or was prepared to wage war.

(3) That such war was against the King.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is required for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you——on or about the——day of——, at——, collected men (*or* arms *or* ammunition, *if any other means were adopted mention those*) with the intention of waging war (*or* being prepared to wage war) against His Majesty, the King-Emperor, and thereby committed an offence punishable under s. 122 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Concealing with intent to facilitate design to wage war.

123. Whoever[1] by any act[2], or by any illegal omission[3], conceals the existence of a design to wage war[4] against the Queen[5], intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[1] Criminal Procedure Code, s. 196.

COMMENT.

This section merely lays down the principle enunciated in s 118, the only difference being that the penalty under this section is severer. Section 44 of the Code of Criminal Procedure says "(1) Every person, whether within or without the presidency towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely) 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which could constitute an offence if committed in British India."

1. **'Whoever'.**—See s 121, *supra*
2. **'Act'.**—See s 33, *supra*
3. **'Omission'.**—See s 33, *supra*
4. **'Wage war'.**—See s 121, *supra*
5. **'The Queen'.**—See s 13, *supra*

PRACTICE.

Evidence.—Prove (1) the existence of a design to wage war against the King.

(2) That the accused knew of such design.

(3) That he concealed the same.

(4) That he intended thereby to facilitate the waging of such war, or that he knew that it was likely that such concealment would facilitate the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows —

That you——knowing that on or about the——day of——, at——, certain [illegible]

[illegible]

s 123 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge.

124. Whoever, with the intention of inducing or compelling the Governor General of India[1], or the Governor of any Presidency[2], or a Lieutenant-Governor, or a Member of the Council of the Governor General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor General, Governor, Lieutenant-Governor or Member of Council,

Assaulting Governor General, Governor, etc, with intent to compel or restrain the exercise of any lawful power.

[1] Criminal Procedure Code, s. 196

assaults[3] or wrongfully restrains[4], or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor General, Governor, Lieutenant-Governor or Member of Council,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section is an amplification of the third clause of s. 121-A. It punishes severely assaults, etc., made on high officers of Government.

1. **'Governor General of India'.**—See s. 16, *supra.*
2. **'Presidency'.**—See s. 18, *supra.*
3. **'Assault.'**—See s. 351, *infra.*
4. **'Wrongful restraint''.**—See s. 339, *infra.*

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was one of the persons described in this section.

(2) That the accused assaulted such person, or attempted to do so; or that the accused wrongfully restrained him or attempted to do so; or that the accused used criminal force or show thereof.

(3) That the accused did as mentioned in (2) in order to overawe that person, or in the attempt to do so [see Assault, Criminal force, Wrongful restraint].

(4) That the accused did as above with the intention of inducing or compelling that person to exercise, or to refrain from exercising, any of his lawful powers.

Procedure.—*Not cognizable——Warrant——Not bailable——Not compoundable*——Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session [*or* High Court].

And I hereby direct that you be tried by the said Court on the said charge. (Vide, Criminal Procedure Code, Sch. V., No. xxviii, 2).

124A. Whoever[1] by words, either spoken or written[2], or by signs, or by visible representation[3], or otherwise, brings or attempts[4] to bring into hatred or contempt[5], or excites or attempts to excite disaffection[6] towards, Her Majesty[7] or the Government established by law in British India[8], shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Sedition.

[1] Criminal Procedure Code s. 196.

Explanation 1[9].—The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation[10] of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section

Explanation 3—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section

COMMENT.

Sedition is a crime against society nearly allied to that of treason and it frequently precedes treason by a short interval Sedition in itself is a comprehensive term and it embraces all those practices whether by word deed or writing, which are calculated to disturb the tranquillity of the State and lead [illegible] vernment and laws of the Empire [illegible] discontent and insurrection and [illegible] the administration of justice into [illegible] incite the people to insurrection and rebellion Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war to bring into hatred or contempt the Sovereign or the Government the laws or constitutions of the realm, and generally all endeavours to promote public disorder[1]

By Act IV of 1898 the present section was substituted for the former section which stood thus —

' Whoever by words, either spoken or intending to be read, or by signs or by visible representation, or otherwise excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added, or with imprisonment for a term which may extend to three years to which fine may be added, or with fine

Explanation—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause

The above section together with s 124A was avowedly inserted in this Chapter relating to offences against the State with a view to fill up an inadvertent omission of a special provision for the punishment of the offence of abetment of rebellion In the words of Sir Fitz James Stephen, it was felt that as the causes which produce rebellion are wide, and spread over a longer period, a wider definition of abetment in the case of rebellion was necessary than sufficed in the case of theft or murder In giving effect to this view, the principles of the English statute and common law were followed, and the section, as originally drafted by the

[1] [illegible] (1888) [illegible] 44 45.

Indian Law Commissioners in 1837, was finally incorporated in the Code in 1870[1], as substantially representing the law of England of the present day "though much more compressed, and more distinctly express"[2].

The present section differs from the repealed section in four ways:

(1) In the repealed section, the offence consisted in exciting or attempting to excite feelings of "disaffection," in the present section, in addition to this, the feeling of "hatred" or "contempt" is made punishable.

(2) In the old section the object of the feeling was "the Government established by law in British India," in the new section, in addition to this "Her Majesty" is also made the object of such feeling.

(3) The offence under the old section was designated "Exciting disaffection," under the new it is called "Sedition."

(4) The old section had one Explanation, the new has three, and they differ from the former.

Principle.—The offence of sedition consists in exciting or attempting to excite in others certain bad feelings towards (*a*) the King-Emperor, or (*b*) towards the Government. Defamatory statements concerning the Sovereign will be punished under this section.

The offence does not consist in "exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, this act would doubtless fall within s. 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section"[3]. A direct incitement to stir up disorder or rebellion is not necessary[4].

Scope.—This section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them.

The offence consists in the *making use of any means for the purpose of* bringing the Government into hatred or contempt.

There must be, first of all, words which are capable of a meaning that can be labelled seditious, and, further, the accused should have the intention of actually exciting or causing the feelings that are mentioned in the section[5].

Intention essential.—The essence of the crime of sedition consists in the intention with which the languge is used. But this intention must be judged primarily by the language itself. Intention for this purpose is really no more than meaning. When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed. In judging articles which are charged as seditious, due allowance should be made for oriental modes of thought and expression and for high-flown or classical language[6].

"The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascer-

[1] Act XXVII of 1870, s. 5.

[2] Per Ranade, J., in *Ramchandra Narayan*, (1897) 22 Bom. 152, 160, F.B.

[3] Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 135.

[4] *Burns*, (1886) 16 Cox 355, 365.

[5] Per Fawcett, J., in *Philip Spratt*, (1927) Fifth Criminal Sessions, case No. 1, decided on November 24, 1927 (Unrep.).

[6] *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848. Intention is essential: Per Woodroffe, J., in *The Amrita Bazar Patrika*, (1919) 30 C. L. J. 289.

tained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published, could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection"[1].

Strachey, J, has elaborately discussed the circumstances which should be taken into account in judging the intention of the accused In his charge to the jury in *Bal Gangadhar Tilak's* case[2] he said "You will thus see that the whole question is one of the intention of the accused in publishing these articles Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures? Or did they intend to excite no feeling adverse either to the Government or its measures, but only to excite interest in a poem about Shivaji and a historical discussion about his alleged killing of a Mahomedan general? These are the questions which you have to consider But you may ask, how are we to ascertain whether the intention of the accused was this that, or the other? How can we tell whether his intention was simply to publish a historical discussion about Shivaji and Afzul Khan, or whether it was to stir up, under that guise, hatred against the Government? There are various ways in which ... You must gather the intention as best ... you may also take into conside... les that have been put in evidence, such as the articles about the plague and the Diamond Jubilee and so forth But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself What is the intention which the articles themselves convey to your minds? In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed? Read these articles, and ask yourselves how the ordinary readers of the *Kesari* would probably feel when reading them Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a ... and so forth? If ... excited to ... feel ... then you may presume that that is all the accused intended to excite If you think that such readers would naturally and probably be excited to entertain feelings of enmity to the Government, then you will be justified in presuming that the accused intended to excite feelings of enmity or disaffection As a matter of common sense ... ary consequences of his acts: ... his language would have the ... disaffection, I did not when ... considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other circumstances in which they were circulated In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication An

[1] Per Edge, C. J., in *Amba Prasad*, (1897) 20 All 55, 69 ... *Nageswar Prasad Sharma* (1924) 9 P. L. T. 766; *Jagat Narain*, (1928) 9 P. L. T. 754

[2] (1897) 22 Bom. 112 139, 142. See

article which, if published in England, or among highly educated people, would produce no effect at all—such as an article on cow-killing—might, if published among Hindus in India, produce the utmost possible excitement. An article which, if published at a time of profound peace, prosperity and contentment would excite no bad feeling, might, at a time of agitation and unrest, excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opinion, it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yacht Club in Bombay; but what you have to consider is their effect, not upon Englishmen or Parsis or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they are circulated and read—Hindus, Marathas, inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time, not in the year 1890 or 1891, or 1892 or 1893, or even 1896, but in June 1897, when these articles were disseminated among them. Then you have to look at the standing and the position of the prisoner Tilak. He is a man of influence and importance among the people; he would be in a position to know what effect such articles would probably produce in their minds. Would then the readers of the *Kesari* at that time, and in the then existing state of the country and of public feeling, regard the articles as a poem and a historical discussion applying no moral to the British Government here and now, or would they be excited by them to feelings of enmity to the Government?

"But in the next place, in judging of the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your common sense, your knowledge of the world, your understanding of the meaning of words, and your experience of the way in which a man writes when he is animated by a particular feeling. Read the articles, and ask yourselves, as men of the world, whether they impress you on the whole as a mere poem and a historical discussion without disloyal purpose, or as attacks on the British Government under the disguise of a poem and historical discussion. It may not be easy to express the difference in words; but the difference in tone and spirit and general drift between a writer who is trying to stir up ill-will and one who is not, is generally unmistakable, whether the writing is a private letter, or a leading article, or a poem, or the report of a discussion. You can form a pretty accurate notion of what a man is driving at, or what he wants to convey, from a perusal of the writing, and can generally tell whether the writing is inspired by good-will or is meant to create ill-will. It is not very difficult to distinguish between the language of hostility and the language of loyalty and good-will or of criticism and comment. You must ask yourselves, having read the articles, whether the writer or publisher is trying to stir up the feelings of his readers against the Government, or is trying to do something altogether different. If the object of a publication is really seditious, it does not matter what form it takes. Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. You have too look through the form and look to the real object: you have to consider whether the form of a poem or discussion is genuine, or whether it has been adopted merely to disguise the real seditious intention of the writer. Again, in judging of the intention of the writer or publisher, you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference to the context. You must consider each passage in connection with the others and with the general drift of the whole. A journalist is not expected to write with the accuracy and

precision of a lawyer or a man of science, he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles It is this general character and tendency that you must judge the intention by, looking at every passage so far as it throws light upon this'

'You must judge the intention having regard to the time at which it was written, the place where it was written, and the whole of the circumstances in which it was written In judging the question of intention of course the language of the article itself is of the utmost importance in enabling you to decide what was the intention of the writer, reading the article as a whole But you are by no means confined to the language of the article itself The subsequent articles are also admissible for the purpose of ascertaining the intention of the accused It has been laid down that, provided the words used and the article sought to be introduced were used and published within a time reasonably near to the time of publication of the words which you are seeking to construe, then it is open to the prosecution to put even the subsequent words in evidence for the purpose of enabling the jury, taking the matter as a whole, to come to a conclusion as to what was the intention of the writer And of course the reason is this If a man has written something which is expressive of disloyalty or disaffection towards Government upon one occasion, he may very likely make use of similar language on a similar occasion either just before or just after the occasion with which you are concerned, and therefore if you find that a man who writes an article about which [illegible] as to whether it is expressive of disloyalty or disaffection or [illegible] se which it is contended is expressive of [illegible] at writing may help you—taking the [illegible] g into consideration—to enable you to come to a conclusion as to [illegible] intention of the writer was [1]

Jenkins C J, very tersely said 'To determine whether the intention [illegible] the rule that a man must be [illegible] of his act must be applied [illegible] e and natural and probable [illegible] ey are addressed appears to [illegible] ul l be excited towards the Government then it is just [illegible] icles are written with that intent and that they are an attempt to create the feelings against which the law seeks to provide' [2]

[illegible] ce of intention [illegible] lained of without [illegible] sarily serve as a defence for, if although it is [illegible] has in fact, used language which would in the minds of the ordinary class of readers excite feelings of hatred against the Indian Government, whether his main object was that or not, there would be a proper basis for a conviction of the accused[3]

The Judicial Committee of the Privy Council have laid down that in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words used having regard among other things to the character and description of that part of the public who are to be expected to read the words[4].

[illegible] [3] Per Fawcett J, in Philip Spratt (1927) [illegible] Sixth Criminal Sessions case No 1 decided on [illegible] November 21 1927 (Unrep).
[illegible] [4] Wazir v [illegible] Advocate G
[illegible] (1919) 21 Bom L R [illegible]
117 I C 534 (1923) I Lah 211

In construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages[1].

A single expression that the people of Bengal are trodden under the feet of outsiders used incidentally in a newspaper article, otherwise innocuous, does not constitute the whole seditious[2]. In a case of sedition, the accused ought not to be convicted merely upon a few isolated passages or a few hasty or strong expressions in the writing charged as seditious. The main question is the general tendency and effect of the pamphlet[3].

"The speeches, must be read as a whole 'in a fair, free and liberal spirit'. In dealing with them one 'should not pause upon an objectionable sentence here or a strong word there.' They should be dealt with 'in a spirit of freedom' and 'not viewed with an eye of narrow criticism.' The case should be viewed 'in a free, bold, manly, and generous spirit' towards the petitioner"[4].

"The intentions of men are inferences of reason from their actions where the action can flow but from one motive, and be the reasonable result of but one intention"[5].

The test of seditious libel is this: Was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter state[6].

The view of the former Chief Court of the Punjab that this section as it now stands is independent of intention[7] is not followed by the Lahore High Court which has laid down that intention is an essential element in the offence of sedition, though the section does not expressly say so. *It is not necessary for the* prosecution to prove the intention directly by evidence which in most cases would be impracticable. The law will presume the intention—whether good or bad—from the language and conduct of the accused, and it will be then for him to show that his words were harmless and his motive innocent[8]. The Bombay High Court has laid down that it is impossible to convict the accused under this section unless it was found that he had an intention of exciting disaffection. In this case the accused had made a declaration, under s. 4 of the Press Act, XXV of 1867, that he was the owner of a certain press called the "Atmaram Press." The management of the press was carried on by another person who looked after the whole concern. At this press was printed a bulky book which purported to be one devoted to metaphysics and philosophy and was styled "Ekashloki Gita." It also contained seditious matter at long and varied intervals and interspersed with discussions of religious matters. The accused took no part in the management of the press; nor did it appear that he had read the book or acquainted himself with the nature of it. He was charged with sedition and convicted of the same. On appeal it was held by Chandavarkar, J., that the cumulative effect of the surrounding circumstances was such as to make it as probable that the accused had not read the book or that he had known its seditious object; and that the evidence having thus been evenly balanced and equivocal, a reasonable doubt arose as to the guilt of the accused, the benefit of which must be given to him. Heaton, J., held that it was impossible to convict the accused under this section unless it was found that he had an intention of exciting disaffection, and that the evidence fell very far short of proving the intention; that, attempt to do a thing must necessarily involve some intention; for a man cannot be said to attempt to do that which he

1 *Manomohan Ghose*, (1910) 38 Cal. 253; *Nageshwar Prasad Sharma*, (1924) 26 Cr. L. J. 78; *Satyaranjan Bakshi*, (1927) 45 C.L.J. 638; *Gopal Lal Sanyal*, (1927) 46 C. L. J. 156; *Ram Chandra*, (1927) 29 Cr. L. J. 381.

2 *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

3 Per Fawcett, J., in *Philip Spratt*, (1927) Fifth Criminal Sessions, case No. 1, dated November 24, 1927 (Unrep.)

4 Per Shah, J., in *Bal Gangadhar Tilak*, (1916) 19 Bom. L. R. 211, 272.

5 Per Fitzgerald, J., in *Sullivan*, (1868) 11 Cox 44, 50.

6 *Aldred*, (1909) 22 Cox 1.

7 *Ram Nath*, (1904) P. R. No. 1 of 1905.

8 *Jivan Singh*, (1924) 6 L. L. J. 379.

has absolutely no knowledge of doing and no intention to do[1]. The question of intention is one of fact[2].

Innuendo.—If a particular article is charged as being seditious on the ground that it says more than appears on the face of it, it is the duty of the prosecution to show that it has in fact the guilty meaning or intent attributed to it[3].

1. **'Whoever'.**—Not only the writer of seditious articles but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government is liable under the section, whether he is the actual author or not[4].

"It is not sufficient for a person who has published matter calculated to excite hatred, contempt or disaffection, to say 'This is not my own work', because the adoption of the means, the publishing thereof was in itself his work and therefore it is, that the printer or publisher of an article which is open to these objections is always to be held liable. For everything that appears in his paper, the editor, printer, or publisher is as responsible as if he had written the article himself. No doubt the question of his liability to punishment is a matter which has to be seriously considered, and circumstances may considerably mitigate the penalty which has to be imposed. But his liability to conviction under the section is not affected by the circumstance that the publisher who used the words did not originate them. The result of his using the words in his publication is the same whether he had written the article himself or made use of it in other ways. Whoever the composer might be, whosoever wrote or caused it to be written, the person who used it for purposes of exciting disaffection is guilty of an offence under s. 124A"[5]. The registered printer of a paper is liable to be convicted for a [illegible] writer of the articles in the paper, unless he can prove absence from the office of the paper in good faith and without knowledge that during his absence seditious matter would be published. It is not absence in good faith for the printer to go away, but with full knowledge of what is going to happen in his absence and for the purpose of shirking his liability[7]. But he is not liable for seditious articles published in the newspaper without his knowledge during his bona fide absence[8]. Where the editor of a newspaper was convicted and sentenced under this section and the accused made his declaration as printer and publisher thereafter, and continued so to act after the editor had resumed work on release from jail, and further allowed his name to appear as such, though he was absent from the town of publication of the paper when certain seditious articles appeared therein, and engaged during the period in his own private business without taking any interest in the paper, it was held that he had not made out the bona fides of his absence, and was, therefore, legally responsible for the articles[9].

A person making a statutory declaration under Act XXV of 1867, that he is the printer and publisher of a newspaper, is presumably liable as such printer or publisher but may rebut such presumption. The liability of a proprietor is not governed by the Act and depends upon different considerations. The ground of liability in his case is that he authorized the publication of the incriminating article. The authority may be established by direct proof or as a reasonabl

1 *Shankar Shrikrishna Dev*, (1910) 12 Bom. L. R. 675.
2 *Ganesh Balwant Modak*, (1909) 12 Bom. L. R. 21.
3 *Joy Chandra Sarkar*, (1910) 38 Cal. 214.
4 *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129; *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 41.
5 Per Batty, J., in *Bhaskar Balwant Bhopatkar*, (1906) 8 Bom. L. R. 421, 435.
6 *Ram Nath* (1918) P. R. No. 1 of 1915.
7 *Upendra Nath Mitter*, (1909) 33 Cal. 915.
8 *Muhammad Sami* (1928) 29 Cr. L. J. 201.
9 *Surendra Prasad Lahiri*, (1911) 38 Cal. 227.

inference from all the facts of the case. Under s. 14 of the Evidence Act, it is *open to the Court to presume that the proprietor, having the control of the paper,* authorizes the publication of the matter which appears in it. Such a presumption may be improper in the case of a large paper, with a separate editor responsible for the selection and publication of the literary matter, but in the case of petty paper, with no responsible editor and published under the eye of the proprietor, the presumption might be reasonable though it would be open to him to rebut such presumption by showing that the publication was in fact not authorized by him. Though no authority to publish libellous matter may have been originally given, such authority may be inferred from the conduct of the parties, such as the publication of other libellous matter without any remonstrance or interference from the proprietor when it has come to his knowledge. Other issues of the same paper containing libellous matter are relevant as evidence to prove such authority. Mere absence of the proprietor at the time of the publication of the libel will not rebut such presumption if during such absence he exercises complete control over the paper[1]. In a Bombay case Chandavarkar, J., said that "a declaration, made under s. 4 (of the Press Act, 1867), is intended by the legislature to have a certain effect, namely, that of fastening responsibility for the conduct of the press on the person declaring in respect of matters where public interests are involved. Therefore, when a book complained of as seditious or libellous is printed in a press, the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption.... is not conclusive; it is not one of law but of fact and it is open to the accused to rebut it....The object is to create a sense of responsibility, so that if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must prima facie be held responsible for it....the Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of s. 124-A....where the charge is under that section"[2]. Knowledge by a printer of the nature of the matter printed is a question to be determined on the particular facts of each case[3].

It is not sufficient for an accused person to say that what was put into his paper of a seditious character was put in during his absence and without his authority. If he did not authorize it, it is for him to prove that as a fact, because it must be within his knowledge whether any such authority was given[4].

Every man must be taken to intend the natural consequences of his own deliberate act, and therefore the law will not excuse a journalist or newspaper writer on the ground that he writes for hire merely, or that the commercial interest of his paper required the publication of the writings in question[5].

In the prosecution in England against the printer of the *Indian Sociologist* the Court, in convicting the printer, said: "If the accused published the libel, there is no distinction in law between what he wrote in it and what any other person wrote in it"[6].

In the case of a manager of a press in which seditious matter is printed, the prosecution must establish by evidence that he had knowledge of such printing[7].

[1] *Gadicherla Harisarvothama Rao,* (1909) 32 Mad. 338.

[2] *Shankar Shrikrishna Dev,* (1910) 12 Bom. L. R. 675, 678, 679.

[3] *Ram Saran Dat,* (1924) 26 Cr. L. J. 302.

[4] *Bhaskar Balvant Bhopatkar,* (1906) 8 Bom. L. R. 421; *Luxman Narayan Joshi,* (1899) 2 Bom. L. R. 286.

[5] *Sullivan,* (1868) 11 Cox 44.

[6] *Aldred,* (1909) 22 Cox 1.

[7] *Chellam Pillai,* (1928) 30 Cr. L. J. 707.

2. Written'.—Disaffection may be excited in a thousand different ways A poem, an allegory, a drama, a philosophical or historical discussion may be used for [illegible] just as much as direct attacks upon the Go[illegible] it remains in the hands of the author un[illegible] Publication of some kind is necessary[1]

Sending a seditious matter by post addressed to a private individual not by name but by designation as the representative of a large body of student amounts to publication if it is opened by anybody[2]

The sending through the post office of a packet containing a manuscript copy of a seditious publication with a covering letter requesting the addressee to circulate it to others, when the same was intercepted by another person and never reached the addressee, was held to amount to an attempt to commit sedition[3]

3 'Visible representation'.—"A seditious libel does not necessarily consist of written matter, and it may be evidenced by a woodcut or engraving of any kind"[4], or by exhibition of flags[5]

The accused published a photographic print called 'The Nation Personified' The photo portrayed a muscular person styled India Personified (*rashtra purusha*) standing on the lotus of self reliance (*swavalambana*) wearing bracelets labelled self rule (*swarajya*) and hail motherland (*vande mataram*) and holding in his right hand a sword called boycott (*bahishkar*) and in his left a map of India covered with portraits of Dadabhai Naoroji Tilak, Paranjpe Bijapurkar and Khare, who were designated as friends of India (*Bharat hind*) and national luminaries (*rashtra dipaka*) In the left hand bottom corner of the photo there were two dogs barking at the *rashtra purusha* labelled as 'Dependents on others (*para valambee*) and near them stood two persons called 'Effeminate (*jaiani*) In the left hand top corner there were portraits of Shivaji Ramdas Goddess of India's Independence (*Shri Bharat Swatantrata*) and Swami Vivekanand Beneath these portraits were two texts (1) 'He who depended upon others lost his cause', and (2) "Will the force of injustice (immorality) or physical force prevail ? In the top right hand corner there were portraits of Chaphekar brothers Ranade Chiplunkar, Phadke Khudiram Bose, Prophulla Chaki Tatya Topi Rani of Jhansi and Nana Saheb some of whom had rebelled against the British Government or had been executed for murder or convicted of sedition These persons were styled 'Reliable Hindu Patriots' The Sessions Judge in convicting the accused of sedition observed 'From the above description of the picture and its meaning, it is clear that it is of a seditious nature and would be likely to excite hatred and disaffection to Government in the minds of persons who look at it ' The High Court in confirming the conviction said 'The main evidence is really the evidence of the photograph itself and although some of the photographs therein contained are photographs of gentlemen against whom there is nothing whatever to be said, yet, we think we must take the photograph as a whole And so considering it we are clear that its symbolism plainly exhorts to hatred of the established Government That is made plain throughout the picture, and particularly by the selection as models for imitation of persons who have rebelled against the existing Government or have been executed for murder or convicted of sedition '

The writer of an article may be guilty of sedition no matter how guarded he attempts to conceal his real object, but the registered printer and publish-

[1] *Bal Gangadhar Tilak* (1897) 22 Bom 112, 139 Foster 198

[2] *Suresh Chandra Sanyal* (1912) 39 Cal 606

[3] *Surendra Narayan Chakravarty* (1911) 39 Cal 522

[4] Per Fitzgerald J, in *Sullivan* (1868) 11 Cox 44, 51

[5] 2nd Rep s 21

[6] *Devu v Mohansing* Criminal Appeal No 331 of 1910 decided on 2nd November 1910 by Batchelor and Rao, JJ, (Bombay) See to the same effect *Emperor v Waman Vamrao* Criminal Appeal No [illegible] of 1910 decided [illegible] by [illegible] and

cannot be punished if the concealed object is not established by the evidence on the record[1].

4. **'Attempts, etc.'**—An attempt is an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment[2]. When a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstances independent of his own will, then that man has attempted to effect the object at which he aimed[3]. To constitute an attempt all that is necessary is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted[4]. It is not necessary in order to bring the case within this section that it should be shewn that the attempt was successful. Attempt does not imply success. It is merely trying. Whoever tries to excite, attempts to excite, etc., is held to come within this section. Whether the intention has achieved the result is immaterial. If the accused tried to excite hatred and contempt, the fact that he failed to do so will be no justification for him. That will be a matter to be decided in determining the sentence[5]. If the attempt is made, the accused cannot shelter himself behind the fact that those to whom he may have addressed himself have either been too discreet or too temperate to act upon the obvious meaning of his teaching[6]; or that the peaceful circumstances and conditions of the Empire render his act innocuous[7]. Where the accused attempts to rouse the feelings penalised by this section, he is guilty although such feelings may not have been aroused in a single person, for an "attempt" is made an equal basis for conviction as is the real rousing or exciting of these particular feelings[8]. What is rendered punishable is the intentional attempt, successful or otherwise, to rouse against Government the feelings enumerated in the section and a mere tendency in an article to promote such feeling is not sufficient to justify a conviction[9].

To determine whether an attempt to commit the offence of sedition is committed by the publication of certain articles, it is necessary to determine what is their true meaning, what is the *innuendo* they convey, and what is the covert meaning, if any, they have. The probable, or natural effect of the words used must then be decided, that is whether they are calculated to bring into hatred or contempt the Government, or excite against it feelings of disloyalty or enmity. If they are so, then it should be considered whether that was not the intention with which the words were used or published. For the purpose of determining whether or not that was the intention, the principle, that a man must be taken prima facie to intend that which is the natural result of his acts under the circumstances and in the particular case in which that act has taken place or occurs, should be applied. In determining whether the intention with which any document is published is or is not seditious, the writer must be deemed to intend the consequence which would naturally follow from his work taking into consideration the time and circumstances of the case[10].

1 *Manomohan Ghose*, (1910) 38 Cal. 253.

2 *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 286. See discussion of 'attempt' in *The Amrita Bazar Patrika*, (1919) 30 C. L. J. 289.

3 *Vinayek Narayen Bhatye*, (1899) 2 Bom. L. R. 304.

4 *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21.

5 *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 439; *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848.

6 *Luxman Narayan Joshi*, sup.; *Bhaskar Balvant Bhopatkar*, sup.; *Burns*, (1886) 16 Cox 355, 365.

7 *Bhaskar Balvant Bhopatkar*, sup., p. 440.

8 Per Fawcett, J., in *Philip Spratt*, (1927) Fifth Criminal Sessions, Case No. 1, decided on November 24, 1927 (Unrep.).

9 *Satyaranjan Bakshi*, (1927) 45 C. L. J. 638.

10 *Vinayak Narayan Bhatye*, (1899) 2 Bom. L. R. 304, 311.

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt, or disaffection, it should be viewed from the standpoint of the types of persons to whom it was primarily addressed On the one hand, their [illegible] fact that the [illegible] The time [illegible]

Existence of a grievance, real or supposed, is no excuse or answer to an attempt to arouse towards Government feelings of hatred, contempt or disaffection[2]

An attempt to publish sedition is complete as soon as a copy of the newspaper containing it is sold It is none the less an attempt because something external to the accused happened which prevented a perusal of the article by the buyers or any other member of the public[3]

In cases decided under the old section the expression "attempts to excite etc ", is explained as follows —

"If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such [illegible] of attempting [illegible] disturbance is [illegible] t, produced by them It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling"[4]

An attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance[5].

5. 'Hatred or contempt' —"With the feeling of hatred the law can do nothing because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite that feeling in others"[6]

'Hatred' and 'contempt' towards Government may be created by writings imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties or by writings unjustly accusing the Government of hostility or indifference to the welfare of the people[7]

The amount or intensity of disaffection is absolutely immaterial except perhaps in dealing with the question of punishment[8]

6. 'Disaffection'.—Explanation 1 says that the word 'disaffection' "includes disloyalty and all feelings of enmity". The expression 'disaffection' is best defined as primarily meaning 'the contrary to affection', and it goes very much towards expressing the same as 'hatred or dislike'. It may cover some thing, perhaps a little different from the expression 'hatred' because it includes 'disloyalty'. To [illegible]

[1] *U Dama Iya*, (1923) 1 Ran. 211

[2] *Vinayak Narayan Bhatye*, (1893) 2 Bom. L. R. 304

[3] *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21

[4] Per Petheram, C. J, in *Jogendra Chunder Bose*, (1891) 19 Cal 35, 44

[5] *Ramchandra Narayan*, (1897) 22 Bom. 152, 156, F B.

[6] Per Batty, J., in *Phadar Balvant Gangadhar*, (1906) 8 Bom L. R. 421, 437

[7] *Besant* (1916) 39 Mad. 1085.

[8] *Bal Gangadhar Tilak*, (1897) 22 Bom 112 134

[9] Per Fawcett, J., in *Philip Spratt*, (1927) Fifth Criminal Sessions, case No. 1, decided on November 24, 1927 (Unrep.).

[10] Per P [illegible] (1929) Sessions [illegible] 1, decided on March [illegible]

The following judicial interpretations given to this word should be noted:

1. 'Disaffection' means a feeling contrary to affection, in other words dislike or hatred[1].

2. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government[2].

3. It means political alienation or discontent, a spirit of disloyalty to the Government or existing authority[3].

4. It signifies political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist and attempt to subvert that Government or power. It cannot be construed to mean an absence of or the contrary of affection, or love, that is to say, dislike or hatred[4].

5. It is a positive political distemper, and not a mere absence or negation of love or good-will. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder[5].

6. It means 'disloyalty'. Anyone who excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite feelings of 'disaffection'[6].

7. Disaffection is a feeling and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion not necessarily prompting the action, but with a tendency to influence conduct just as all our feelings do. It is not necessarily limited to "feelings of enmity." It is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded but only such feelings as the relation of the subject to the Government necessarily implies. This relation implies the recognition, on the part of the ruled, of the Government as a Government. The ruler must be accepted as a ruler, and disaffection, which is the opposite of that feeling, is the repudiation of that spirit of acceptance of a particular Government as ruler[7].

When the Bill for amending this section was introduced it was proposed to add the words "or ill-will" at the conclusion of Explanation 1. But the Select Committee thought that the expression "all feelings of ill-will" was too wide and vague. They said: "It is only when feelings of ill-will amount to disloyalty or enmity that they constitute such disaffection as is contemplated by the clause. A certain amount of ill-will may be compatible with genuine loyalty"[8]. In view of this opinion some of the interpretations given above, notably those of Strachey, J., and Edge, C. J., are not of any authority.

7. **'Her Majesty'**.—'Her Majesty' means the sovereign for the time being of the United Kingdom of Great Britain and Ireland (s. 13).

8. **'Government established by law in British India'**.—This means British rule and its representatives as such,—the existing political system as dis-

[1] Per Petheram, C. J., in *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.
[2] Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 134.
[3] Per Farran, C.J., in *Ramchandra Narayan*, (1897) 22 Bom. 152, 156, F.B.
[4] Per Parsons, J., in *ibid*, p. 159.
[5] Per Ranade, J., in *ibid*, p. 162.
[6] Per Edge, C. J., in *Amba Prasad*, (1897) 20 All. 55, 68, F.B.
[7] Per Batty, J., in *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 437, 438.
[8] G. I., 1898, Part V, p. 14.

tinguished from any particular set of administrators[1] It means "to put it very briefly, British rule in India as established by the Government of India Act"[2]. In this sense the 'Government' includes not only the Government of India but also Local Government[3] 'Government does not mean the person or persons for the time being It means the person or persons collectively, in succession who are authorized to administer Government for the time being On particular set of persons may be
and excite hatred again
Government because the
abstract conception which is Government[4] There is a clear distinction between the Government and the individual officers employed under the Government

the various Governments constituted by the statutes relating to the Government of India now consolidated into the Government of India Act of 1915 (5 & 6 Geo V, c 61) and would denote the person or persons authorised by law to administer Executive Government in any part of British India The feelings which it is the object of s 124A to prohibit, may be excited towards the Government in a variety of ways it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India must depend upon the nature of the criticism the position of the service in the administration and all the other circumstances of that case It would be a question of fact to be determined in each case with reference to its circumstances[6] The phrase 'Government established by law in British India means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted[7]

The Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace Therefore where you criticise the Civil Service en bloc the question whether you excite disaffection against the Government or not seems to me a pure question of fact You do so if the natural effect of your words infusing hatred of the Civil Service is also to infuse hatred or contempt of the established Government whose accredited agent the Civil Service is You avoid doing so if, preferring appropriate language of moderation you use words which do not naturally excite such hatred of Government It is a mere question of fact[8]

[illegible] in the Government o [illegible] ment of India as [illegible] nature[9]

As to the definition of Government, see s 17 supra The expression 'established by law in British India' restricts the meaning which this word otherwise has

[1] Per Strachey J in Bal Gangadhar Tilak (1897) 22 Bom 112, 135
[2] Per Fawcett J in Philip Spratt (1927) Fifth Criminal Sessions case No 1 decided on November 24, 1927 (Unrep)
[3] Jewral, (1915) 39 Mad 1 [illegible]
[4] Per Batty J in Bhaskar Balvant Bhopatkar (1906) 8 Bom L R 421, 431
[5] Raj Pal, (19[illegible]) 3 Lah 405
[6] Per Shah J in Bal G Tilak, (1916) 19 Bom L R 211, 2[illegible]
[7] Sundar Lal (1919) 42 All 233, F B
[8] Per Batchelor J in Bal G Tilak supra p 2[illegible]
[9] Per Fawcett J, in Philip Spratt, (1927) Fifth Criminal Sessions case No [illegible] decided on November 24, 1927 (Unrep)

As to the definition of 'British India', see s. 15, *supra*.

Incitement to secure 'Swaraj'.—'Swaraj' does not necessarily mean Government of the country to the exclusion of the present Government, but its ordinary acceptance is 'home-rule' under the Government. The incitement of the members of a public meeting to exert themselves to secure 'Swaraj' does not amount to sedition[1]. This case draws a sharp line between change of Government and a change of form of Government. Advocating 'home-rule' for India is not *per se* objectionable. But such advocacy must not offend against existing laws[2].

9. Explanations 2 and 3.—Both these explanations have a strictly defined and limited scope. They have no application whatever unless the article in question criticises "the measures of Government" or "administrative or other action of the Government" and that too "without exciting or attempting to excite hatred, contempt, or disaffection". The object of the explanations is to protect bona fide criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.

The Select Committee to which the Bill to amend this section was referred, in their Report say: "We have added explanation 3 to make it clear that criticism on the action of Government is not confined to cases in which it is sought to bring about an alteration of what has been done. For example, suppose the Government make an appointment which is considered objectionable. That appointment may be criticised, although the criticism may not have in view the cancellation of the appointment. We have made consequential amendments in explanation 2 to make the language of the two explanations uniform".

Explanations 2 and 3 give a perfect freedom to journalists, to publicists, to orators and public speakers to discuss the measures and administrative acts of Government, to disapprove of them, to attack them, and to use forcible and strong language if necessary, and to do everything legitimate and honest in bringing before the public or the Government the fact that their measures or their actions are disapproved by a section of the public or by that particular speaker or journalist. But a publicist, a journalist, or a speaker, has no right to attribute dishonest or immoral motives to Government. Criticism, though harsh and uncompromising, must be free from the taint of language which is likely to arouse or calculated to engender feelings of enmity, hatred, or disloyalty against Government[3].

The limits to which a public speaker or writer can go in criticising the acts of Government are well summarized by Strachey, J.—"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section"[4].

1 *Beni Bhushan Roy*, (1907) 34 Cal. 991.

2 *Besant*, (1915) 39 Mad. 1085.

3 *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848; *Phanendra Nath Mitter*, (1908) 35 Cal. 945.

4 *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 137, approved of in *Manomohan Ghose*, (1910) 38 Cal. 253. See *Satyaranjan Bakshi*, (1927) 45 C. L. J. 638.

"Full liberty of the press is preserved to writers and publishers of newspapers to make whatever comments they like and in however strong language expressing [illegible] thing to use strong [illegible] It is quite another [illegible] thing far different, namely excites or attempts to excite hatred, contempt or disaffection against the Government That is the distinction which is drawn Liberty of the press by all means say what you like, in whatever language you like, however strong Condemn measures of Government by all lawful means and argument But while making use of the liberty of the press do not transgress the reasonable limit which is imposed for the safety of the Government, that is to say do not excite or attempt to excite hatred, or contempt or disaffection towards the Government established by law in British India

"It has been the policy of the Legislature to preserve as far as possible and within all reasonable limits the cherished freedom of the Press which has been for generations one of the joys and privileges of the British people in whatever part of the world they have found themselves Under explanation 3 it is open to any newspaper editor or proprietor to express his disapprobation in whatever language he likes and however strong of any administrative or other action of the Government It does not matter what is the language used to condemn the administrative or other action of the Government provided he does not overstep the limit on what the safety of the Government depends, the proviso being that he must not excite or attempt to excite hatred or contempt or disaffection' [1]

Liberty of the press means complete freedom to write and publish without censorship and without restriction, save such as is absolutely necessary for the preservation of society It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good It would also be its duty to complain of [illegible] to be removed, though the very assertio [illegible] certain extent Such writings, though [illegible] receive the protection of a jury

Every man is free to write as he thinks fit, but he is responsible to the law for what he writes, he is not, under the pretence of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions Political writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such writings are to be regarded in a free and liberal spirit A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives, with the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so and to do so in a free and fair and liberal spirit The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion[2]

'Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country ..

1 Per Blackwell, J., in *Keshavji Khaddar*, (1929) Second Criminal Sessions case No. 1, decided on March 27, 1929 (Unrep.)

2 *Sullivan*, (1868) 11 Cox 44, 49, 50; *Collins*, (1839) 9 C. & P. 456. See also *Lambert & Perry*, (1810) 2 Camp. 398

Every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State"[1]. Where the object of the speaker was to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people (*svarajya*) and there was a distinct pleading that the political changes thus advocated should be obtained by lawful and constitutional means, it was held that there was no infringement of the provisions of this section[2].

An article imputing wholesale bribery to the ministerial officers of the law Courts and to the lower officers of the police force, and expressing grave doubts as to whether the Government ever inquire into such abuses, so much is it occupied with investigations of boycott, dacoity and sedition, published when sedition is rife and the minds of people excited, may have the effect of creating a feeling that the Government is not doing its duty, and exceeds the limits of fair comment and is seditious, irrespective of the question of the truth of the allegations[3].

The conditions at present in India are quite different from those which existed in 1897 and far greater freedom is given to the press now than was given in those days and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. The Court is to consider the existing state of the minds of the people and the existing conditions and to decide whether the article is likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers[4].

An article in a newspaper, which is an attack upon the Government and also upon the personnel which constitute the Government, attributing to them a deliberate policy of fomenting communal strifes comes under the purview of this section, as anybody reading the article and believing in the existence of such a policy would naturally both hate the Government and hold it in contempt and be disaffected towards it.

Every one has a right to comment upon the action of any particular individual or set of individuals; but the article must be read as a whole to see if it is likely to bring the Government into hatred or contempt or is both to excite disaffection[5].

A criticism of the acts of the police which represents one of the chief agencies of the Government will fall within the purview of this section if the natural effect of the words used is to infuse hatred or contempt of the Government[6].

10. **'Disapprobation'.**—This means simply disapproval. It is quite possible to disapprove of a man's sentiments or actions and yet to like him[7]. It is quite possible to like or to be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly[8].

It is not sedition for a writer to describe the Reform scheme as being monstrous and misbegotten, because it is not founded on democratic principles and not a genuine reform or a genuine initiation of constitutional progress, or to assert that some of the police officials and the judiciary are corrupt, unscrupulous and

1 Per Batty, J., in *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 441. See the observation of Sadasiva Aiyar, J., in *P. Varadarajulu Nayudu*, (1919) 37 M. L. J. 81, 88.

2 *Bal Gangadhar Tilak*, (1916) 19 Bom. L. R. 211.

3 *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

4 See *Nageswar Prasad Sharma*, (1924) 9 P. L. T. 766.

5 *Jagat Narain Lall*, (1928) 9 P. L. T. 784.

6 *Satya Ranjan Bakshi* (1929) 117 I. C., 834.

7 Per Petheram, C. J., in *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.

8 Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 137.

partial, or to state t [illegible] is suppressed by proclama [illegible] sponsibility will not rest on him [illegible] political activity in order to [illegible] f fiercely enthusiastic and unscrupulous forces, or to inculcate the doctrine of passive resistance or refusal of co-operation with the Government within legal limits, or to describe the British Courts in India as ruinously expensive[1]

Dramatic performances.—Under the Dramatic Performances Act the Local Government may prohibit any dramatic performance of a nature likely to excite feelings of disaffection to the Government[2] and authorize seizure of all its paraphernalia[3] Persons taking part in any such prohibited performance may be prosecuted and convicted[4] A conviction under this Act is no bar to a prosecution under this section[5]

Liability for letters of correspondents—The editor of a paper is liable for unsigned seditious letters appearing in the paper[6]

Dissemination of seditious matter—Section 108 of the Criminal Procedure Code can be brought into operation when any person is found to be disseminating seditious matter It runs as follows —

'Whenever a Chief Presidency or District Magistrate or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who within or without such limits either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate or in anywise abets the dissemination of —

(a) any seditious matter that is to say any matter the publication of which is punishable under section 124A of the Indian Penal Code or

(b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, if in his opinion there is sufficient ground for proceeding may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond with or without sureties for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix

No proceedings shall be taken under this section against the editor proprietor, printer or publisher of any publication registered under and edited printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867, with reference to any matter contained in such publication except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf '

Liability for publishing seditious extracts—The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news This will be a matter for the jury in considering the criminal intent but they must also consider the circumstances under which the writings were copied the state of the country at the time the class of persons to whom the newspaper is addressed the nature of the editorial comments accompanying them, if any, or their absence, if none, the general tone of the other writings in the newspaper, as the intent of the publisher is to be inferred from the natural consequences of his act[7]

1 Manomohan Ghose (1910) 38 Cal 253.
2 Act XIX of 1876, s. 3
3 Ibid, s. 8
4 Ibid s. 6
5 Ibid s. 9
6 Aparba Krishna Bose (1907) 35 Cal 141 1?.
7 [illegible] (1898) 11

Republication of seditious articles from another newspaper, one of which only was filed as an exhibit by the prosecution and used in the case against the editor of that paper on his trial for sedition, is not a report of the proceedings of a Court of Justice, and is not justifiable[1].

Where the compiler of certain Hindi Readers, meant for the use of children, collected together seditious utterances and sentiments which had already been published and the cumulative effect of which was to bring into hatred and contempt the Government, it was held that the books could be proscribed even though the originals were not proscribed. A compilation consisting of extracts from various sources may be seditious and a fit subject for an order of proscription, though the extracts considered in relation to their own proper contexts may not be in themselves of a seditious nature[2].

Seditious meeting.—Stephen[3] says: "If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is such as to produce reasonable fear of a breach of the peace, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence, though it may expose him to serious consequences if the meeting becomes disorderly and has to be dispersed, for in such a case force may be used against all persons who are present, whether they take part in the unlawful object of the meeting or not".

"If one man uses seditious words at a meeting those who stand by and do nothing, although they do not reprobate them, are not guilty of uttering the seditious words. Those even who make a speech themselves are not guilty of uttering seditious words unless you can gather from the language they use that they are endeavouring to assist the other man in carrying out that portion of his speech, and by that course endeavouring to assist him in causing his words which excite to disorder to produce their natural effect upon the people"[4].

To prevent meetings of a seditious character the Prevention of Seditious Meetings Act is passed. It is set out in full in the Appendix.

PRACTICE.

Evidence.—Prove (1) that the accused spoke or wrote the words, or made the signs or representations, or did some other acts, in question.

(2) That he thereby brought or attempted to bring into hatred or contempt; or excited or attempted to excite disaffection.

(3) That such disaffection was towards His Majesty, or the Government of British India.

Evidence of publication.—If the manuscript of a seditious writing be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the accused, although there was no evidence given to show that the printing and publication were by the direction of the accused[5].

1 *Apurba Krishna Bose,* (1907) 35 Cal. 141.
2 *Baijnath Kedia,* (1924) 47 All. 298.
3 History of Criminal Law of England, Vol. II. p. 386.
4 Per Cave, J., in *Burns,* (1886) 16 Cox. 355, 366.
5 *Lovett,* (1839) 9 C. & P. 462.

In order to establish the fact of publication of seditious matter transmitted through the Post Office it is not necessary to prove the actual posting, nor that it was printed and published under the directions of the accused If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him[1]

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following", and then set out several sentences as though they had been uttered continuously The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts of the speech, other matter intervening between them It was held that there was no variance, and that if any portions of the speech omitted varied, or controlled the sense of those parts that were set out, the onus was upon the defendant to show it[2]

Upon an indictment against A B and others, for unlawfully meeting together [illegible] presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to show the intention of A B in assembling and attending the meeting in question[3]

Intention as gathered from other articles.—Seditious articles published in the same newspaper, not forming the subject of the charges, on which the accused is being tried at the time, are admissible to show the intention of the person, who printed or published the latter[4]

Articles not forming the subject of the charge and appearing in other issue of the same paper are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity[5]

Intention as gathered from speeches not charged as seditious—When certain speeches form the subject matter of a charge for sedition and when such speeches form part of series of speeches or lectures on one topic delivered within a short period of time, any of such speeches or lectures will be admissible, under s 14 of the Indian Evidence Act as evidence to prove the intention of the speaker in respect of the speeches which form the subject matter of the charge[6] Where the [illegible] a letter purporting to have been written [illegible] sending for publication a portion of a [illegible]tter mentioned the writer's motive in writing the portion sent, it was held that the copy of the letter was relevant under ss 9 and 14 of the Indian Evidence Act, as evidence of the accused's intention and was admissible; and that it was not necessary for the prosecution to prove that the letter was sent before its copy could be admitted[7] A writing made subsequently by the accused and found in his possession, though not published, is admissible at his trial for an offence punishable under this section, as a piece of evidence which can be shown to the jury and used in argument[8]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered

1 *Surendra Narayan Adhicary* (1911) 39 Cal 522

2 *Crowe*, (1848) 3 C & K 123.

3 *Henry Hunt*, (182?) 3 B & A. 566.

4 *Jhanendra Nath Mitter* (1908) 35 Cal 945, *Harasarvothama Rao*, (1909) 32 Mad 338

5 *Manomohan Ghose*, (1910) 38 Cal. 253.

6 *Chidambaram Pillai*, (1909) 32 Mad. 3.

7 *Philip Spratt* (No. 2), (1927) 30 Bom. L. R. 314

8 *Philip Spratt* (No. 3), (1927) 30 Bom. L. R. 31?

Chapters IV and V of the Code apply to offences punishable under this section[1].

Special jury.—A trial for sedition before the High Court should ordinarily be before a special jury[2].

Sanction.—Sanction of Government is necessary for prosecution under this section[3]. A committment of the accused upon the evidence recorded before such sanction has been given is illegal[4]. Orders under s. 196 of the Criminal Procedure Code should be expressed with sufficient particularity and with strict adherence to the language of the section. An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper without specifying their names, and containing a misdescription of the seditious article. On the day of the trial an amended order correcting the errors in the previous order was filed. It was held that the prosecution was rightly instituted[5]. Section 196 only requires that the complaint should be made upon authority from the Local Government and not that the actual complaint must be expressly authorized by the Local Government. A complaint is not defective because it does not set out the speeches or alleged seditious words which form the subject-matter of the charge[6]. If the accused is charged under this section and also under s. 153A the charge does not become defective merely because it does not set out what portions of the speech of the accused are within the provisions of this section and what are within those of s. 153A.

It is not necessary that the order of Government sanctioning the prosecution should specify the sections under which the accused is to be tried[7].

Joint trial of printer and publisher.—The printer and the publisher of a seditious writing can be tried jointly[8].

Jurisdiction.—The offence is complete either in the district where the author hands over the document for the purpose of being communicated to the public or in the district where it is sent by post for publication and is published[9]. Sending newspapers by post from the office where they are published to other places constitutes in law publication at the places where they are sent[10].

Confiscation.—A Magistrate can order forfeiture of a newspaper or book containing seditious matter under s. 99A of the Criminal Procedure Code.

Appeal to Privy Council.—Once it appears that the principles of the law of sedition have been rightly understood by the local tribunal, the question whether those principles have been properly applied is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board to interfere on this ground with the conclusions arrived at by the Courts in India[11].

Charge.—In a Madras case it has been ruled that a charge of an offence under this section is defective if it does not set out the speeches or passages in speeches alleged to be seditious, but such defect does not vitiate the proceedings in virtue of ss. 225 and 537 of the Code of Criminal Procedure[12]. But in a subsequent case two other Judges of the same High Court have held that if an offence under this section is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably

1 Act XXVII of 1870, s. 13.
2 *Philip Spratt (No. 1)*, (1927) 30 Bom. L. R. 313.
3 Criminal Procedure Code, s. 196.
4 *Mulla Abdul Rahim*, (1882) P. R. No. 28 of 1882.
5 *Apurba Krishna Bose*, (1907) 35 Cal. 141; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112.
6 *Chidambaram Pillai*, (1908) 32 Mad. 3.
7 *Virumal Begraj*, (1910) 4 S. L. R. 55.
8 *Shantaram Mirajkar*, (1927) 30 Bom. L. R. 320.
9 *Burdett*, (1820) 4 B. & Ald. 717.
10 *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129.
11 *Kali Nath Roy*, (1920) 48 I. A. 96, 98, 99, 23 Bom. L. R. 709, 6 Bom. Cr. C. 62.
12 *Chidambaram Pillai*, sup.

sufficient to enable the accused to know the matter with which he is charged, i e, [illegible]

[illegible]

of the words used are not entered at all in the charge, this will be only an irregularity which, under s 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice[2].

[illegible]

[illegible] ame of the

That you, on or about the——day of——, at——, by writing (*or* speaking) the words (*mention them*) (*or* by signs *or* by visible representation, *or* otherwise) brought (*or* attempted to bring) into hatred or contempt (*or* excited *or* attempted to excite disaffection towards) His Majesty, the King Emperor (*or* the Government established by law in British India), and thereby committed an offence [illegible] the cognizance of the Court

[illegible] said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Punishment.—The framers of the Code wished to draw a marked distinction between minor offences and those of a very serious character where transportation would be the only appropriate punishment The sentence of transportation is not an alternative for imprisonment as in ss 121A and 122[3]

125. Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Queen or attempts to wage such war, or abets[1] the waging of such war, shall be punished with transportation for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

Waging war against any Asiatic Power in alliance with the Queen

COMMENT.

Object.—This section restrains a person from making British India the focus of intrigues and enterprise for the restoration of deposed rulers or other like purposes And the fulfilment of the obligations of the State to allies and friendly powers requires that the abetment of such schemes by its subjects whether by furnishing supplies or otherwise should be forbidden[4] The principle of this section is based upon international comity and a desire of the State to remain friendly with its neighbours[5].

Where a person dwelling in British territory waged war with the Raja of Manipore, a country lying beyond British India, he was punished under this section[6].

[1] *Mylapore Krishnaswami* (1909) 32 Mad 384, per Benson and Wallis, JJ., Sankaran Nair, J., dissentiente The Judicial Commissioners Court, Sind, has held that it is not necessary to specify the passages in the charge [illegible] (1910) [illegible] L. R [illegible]

[2] *Trilokamdas P. Maneckchand*, (1908) 10 Bom L. R. 801; [illegible]

[3] See G. I., 1878, Part V, p. 13.

[4] M & M 103.

[5] *Jenssen*, [illegible]

[6] [illegible]

The offences defined in this section and ss. 126 and 127 are similar to those made punishable under the Foreign Enlistment Act, 1870[1], which applies to India. Sections 11 and 12 of that Act are as follows:—

"11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and ammunitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender".

1. **'Abets'.**—See s. 107, *supra*.

PRACTICE.

Evidence.—Prove (1) that the Power in question is Asiatic, and in alliance, or at peace, with the King.

(2) That the accused waged war against the Government of such Power; or that the accused abetted or attempted the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section[2].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, waged (*or* attempted to wage *or* abetted the waging of) war against the Government of——an Asiatic Power in alliance (*or* at peace) with the King-Emperor and thereby committed an offence punishable under s. 125 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Committing depredation on territories of Power at peace with the Queen.

126. Whoever commits depredation[1], or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

COMMENT.

The preceding section made punishable the waging of war against any Asiatic power in alliance with the King-Emperor: this section prevents the commission

[1] 33 & 34 Vic., c. 90.

[2] Criminal Procedure Code, s. 196.

of depredation or plunder on territories of States at peace with the King Emperor

This section is much wider than the preceding section for it applies to a Power which may or may not be Asiatic

The Foreign Enlistment Act[1] punishes any British subject for similar acts See the notorious case of *R* v *Jameson*[2]

1. **'Commits depredation'** —Something more than a mere outrage against the property of an individual seems to have been contemplated[3]

PRACTICE

Procedure —Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session

Sanction —Sanction of Government is necessary for prosecution under this section[4]

Charge —I (*name and office of Magistrate, etc*) hereby charge you (*name of the accused*) as follows —

That you on or about the——day of at—— committed (or made preparations to commit) depredation on the territories of—— a Power in alliance (or at peace) with the King Emperor, and thereby committed an offence punishable under s 126 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge

Receiving property taken by war or depredation mentioned in sections 125 and 126

127. Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126 shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received

COMMENT

The actual depredators taking refuge with their plunder within British territory will not come within this provision The section applies to those persons who knowingly receive the property obtained by waging war with a power at peace with the King Emperor or by committing depredation on its territories Such persons are punished under this section apart from the fact whether the principal offender has been prosecuted or not otherwise persons waging war or committing depredation may find a market in British India to sell their spoils

PRACTICE

Evidence —Prove (1) that the property in question was obtained by waging war against any Asiatic Power or by commission of depredation

(2) That such war or depredation was punishable under s 125 or 126

(3) That the accused received such property

(4) That when he so received such property, he knew that it had been obtained as mentioned in (1)

Procedure —Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session

[1] 33 & 34 Vict c 90
[2] (1896) 2 Q B 425
[3] M & M [illegible]
[4] Criminal Procedure Code s [illegible]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, received (*specify the property*) knowing the same to have been taken in waging war against——an Asiatic Power in alliance (*or* at peace) with the King-Emperor [*or* knowing the same to have been taken in the commission of depredation on the territories of ——, a Power in alliance (*or* at peace) with the King-Emperor], and thereby committed an offence punishable under s. 127 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Public servant voluntarily allowing prisoner of State or war to escape.

128. Whoever, being a public servant[1] and having the custody of any State prisoner[2] or prisoner of war[3], voluntarily[4] allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section and s. 225A are based on the same principle. In both the sections the public servant who has the custody of the prisoner is punished if he voluntarily allows such prisoner to escape. The only difference between the two sections is that in the former the prisoner is a State prisoner and therefore the punishment is severer, whereas in the latter the prisoner is an ordinary criminal. Thus the offence under this section is an aggravated form of an offence under s. 225.

1. **'Public servant'.**—See s. 21, *supra*.

2. **'State prisoner'.**—A State prisoner is one whose confinement is necessary in order to preserve tranquillity in the territory of any Native State entitled to protection, or the security of the British dominions from foreign hostility or from internal commotion, and who has been confined by the order of the Governor-General in Council[1].

3. **'Prisoner of war'.**—A prisoner of war is one who in war is taken in arms. Those who are not in arms, or who being in arms submit and surrender themselves, are not to be slain but to be made prisoners. But it seems those only are prisoners of war who are taken in arms[2].

4. **'Voluntarily'.**—See s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he had the person in question in his custody.

(3) That such a person was a State prisoner or prisoner of war.

(4) That the prisoner escaped.

(5) That the accused allowed the prisoner to escape from the place where he was confined.

(6) That the accused did so voluntarily.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

1 Beng. Reg. III of 1818; Bom. Reg. VIII of 1818; Mad. Reg. II of 1819. See Acts XXXIV of 1850 and III of 1858.

2 M. & M. 107.

Sanction.—Sanction of Government is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows :—

That you, being a public servant (*mention the office*), and as such having the custody of——, a State prisoner (or prisoner of war), on or about the——day of——, at——, voluntarily allowed such prisoner to escape from——, the place in which such prisoner was confined, and thereby committed an offence punishable under s 128 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge

Public servant negligently suffering such prisoner to escape

129. Whoever, being a public servant[1] and having the custody of any State prisoner or prisoner of war[2], negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine

COMMENT.

The offence under this section is like the one under s 128 with the mitigating circumstance that the escape of the prisoner was not allowed voluntarily but suffered negligently This section is similar to s 223 which punishes the escape of an ordinary prisoner under similar circumstances

1. **'Public servant'**.—See s 21, *supra*
2. **'State prisoner or prisoner of war'**.—See s 128 *supra*

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant

(2) That he had the person in question in his custody

(3) That such person was a State prisoner or prisoner of war

(4) That the accused suffered such prisoner to escape from the place of confinement

(5) That the accused did so negligently

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class

Sanction.—Sanction of Government is required for prosecution under this section[1]

Charge.—I (*name and office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows :—

That you, being a public servant (*mention his office*), and as such having the custody of——, a State prisoner (or prisoner of war), on or about the——day of——, at——, negligently suffered such prisoner to escape from any place of confinement in which such prisoner was confined, and thereby committed an offence punishable under s 129 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge

1 Criminal Procedure Code s. 196. 1 Criminal ...

Aiding escape or rescuing or harbouring such prisoner.

130. Whoever knowingly aids or assists[1] any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

COMMENT.

This section uses words more extensive than those in the two preceding ones which contemplate an escape only from some prison or actual place of custody. Again, under the last two sections the offender is a public servant; under this section, he may be any person.

This section is somewhat narrower in scope than s. 129. It requires that the rescue or assistance should be given 'knowingly'.

1. **'Knowingly aids or assists'.**—It is essential to show that the accused had a knowledge of the character in which the prisoner is confined, i.e., that he is a prisoner of State or of war.

PRACTICE.

Evidence.—Prove (1) that the person in question was a prisoner of State or of war.

(2) That such prisoner was at the time in lawful custody; or

That such prisoner has escaped from lawful custody.

(3) That the accused knew that such person was in lawful custody as a prisoner of State or of war; or

That he knew that such prisoner had escaped therefrom.

(4) That he aided or assisted such prisoner in escaping; or that he rescued such prisoner or attempted to do so; or

That he harboured or concealed such prisoner; or

That such prisoner was about to be recaptured, but the accused offered or attempted to offer resistance to such recapture.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, knowingly aided (*or* assisted, *or* offered to rescue, *or* attempted to rescue)——, a State prisoner (*or* prisoner of war), in escaping from lawful custody (*or* knowingly harboured *or* concealed)——, a State prisoner (*or* prisoner of war) who had escaped from lawful custody [*or* knowingly offerered *or* attempted to offer resistance to the recapture of—, a State prisoner (*or* prisoner of war) who had escaped from lawful custody], and threby committed an offence punishable under s. 130 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

CHAPTER VII.

Of Offences relating to the Army, Navy and Air Force.

The authors of the Code say "A few words will explain the necessity of

military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence Nor is it desirable that

of military
proceeded
ment of the

who commits that offence
only to the punishments
and must necessarily be, far more severe than that under which the body of the people live The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated, according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher or a kidnapper. We have attempted in this chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who, not being military, abet military crimes"[1].

Calcutta Rule.–
Department of the G
all cases in which per
ment are convicted in a Criminal Court[2].

It has been brought to the notice of the High Court that Magistrates, in awarding penalties for offences committed by native military pensioners, not infrequently recite their belief that such pensioners will (on conviction) be subjected to an additional penalty, in the shape of loss of pension, and that they take this circumstance into account in deciding on the severity of the sentence passed by them on the offenders This procedure on the part of Magistrates is incorrect, in so far as it proceeds on the assumption that the pensioners thus convicted must necessarily forfeit their pensions The attention of all Magistrates is invited to

[1] Note D, p. 120

[2] C. H. C. R. & O., Vol. I, Ch. I., s. 102, p. 36.

Magistrates should, therefore, not assume that in such cases forfeiture of pension is an invariable consequence of a conviction[1].

The attention of all Sessions Judges and Magistrates of the first and second classes in Bengal and Eastern Bengal and Assam is invited to the following order of the Government of India:—

"In the case of a reservist of the Native Army who may be sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, a report should be made to the Adjutant-General in India"[2].

Lahore Rule.—Criminal cases against military officers and soldiers, should only be taken up by District Magistrates or Magistrates of the first class, and this direction should be strictly observed.

2. Cases falling under ss. 154 and 156 of the Army Act, 1881, should be dealt with by District Magistrates or Magistrates of the first class who are European British subjects and Justices of the Peace, and by no other class or description of Magistrate.

3. In every case in which a military officer or a soldier is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order *proprio motu* to the immediate superior of the person convicted.

4. Whenever a soldier is committed to jail, whether for trial or under sentence, his military rank shall always be stated in the warrant of commitment, in order that due notice may be given to the military authorities of the day on which, and hour at which, the imprisonment of such person will expire.

5. When a person amenable to Military Law is convicted of any offence by a Cantonment Magistrate, information in the form given below shall be furnished by such Cantonment Magistrate to the superior officer of the person so convicted:—

form of information.

Name and Military rank of person convicted.	Offence of which convicted.	Sentence.	Date.

6. On all occasions on which a British soldier may have to be conveyed in custody from one place to another, whether before or after sentence, application should be made to the local Military authorities for a military escort to accompany such prisoners to the jail. The employment of Indian policemen on such duties is strictly prohibited.

7. The annexed extract from a letter from the Secretary to Government, Punjab, pointing out the consequences resulting from a sentence of rigorous imprisonment being passed upon a soldier in His Majesty's service, is published for information and guidance:

Extract (paragraph 2) from a letter No. 3565, dated 30th October 1876, from the Secretary to Government, Punjab, to Registrar, Chief Court, Punjab.—

"(2) The Lieutenant-Governor would be obliged if the Judges of the Chief Court would point out to Magistrates that a sentence of rigorous imprisonment or hard labour, when passed upon a soldier in Her Majesty's service, involves his discharge under Military Regulations, and that, consequently, though unintention ally, they may, in passing such a sentence, give a far higher punishment than they in any way intended. This point, the Lieutenant-Governor thinks, should be borne in mind by Magistrates when trying soldiers for petty offences".

8. Whenever a Military pensioner is convicted and sentenced to imprisonment by a Criminal Court, a report, containing information regarding the nature and circumtances of the offence and the amount of imprisonment to which the

[1] C. H. R. & O., Vol. I, Ch. I, s. 103, p. 36. [2] *Ibid*, s. 104, p. 37.

offender has been sentenced, shall be made at once direct to the Controller of Military Accounts of the division within which the conviction takes place A similar report should also be made to the Postmaster General, Punjab and North-West Frontier Province, as Military pensioners in the Punjab are paid through [illegible] such [illegible] ns, in [illegible] neral, Punjab and North West Frontier Province

9 Whenever a reservist of the Indian Army is sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months the facts are to be reported, in the manner described in the last preceding paragraph, without delay to the Adjutant-General in India

10 The following are the rules for the defence of British and Indian soldiers charged with criminal offences and prosecuted by Government in Civil Courts —

1 When soldiers are to be tried by a Civil Court upon any criminal charge the Brigade Commander should consult the District Magistrate and arrange with him for the selection and remuneration of a Pleader, Advocate or Barrister as the importance and necessities of the case may require

2 The maximum amount that may be paid to the Pleader, Advocate or B[illegible]

3 The Brigade Commander is only to appoint a Pleader, Advocate or Barrister in cases where he thinks it desirable The amount to be paid to counsel must be definitely settled beforehand, subject to the maxima above, an agreement will be made *in writing* and signed by the Brigade Commander and the Pleader Advocate or Barrister If suitable counsel cannot be obtained for the remuneration admissible under these rules, the case should be reported to superior authority with a view to the o[illegible]

4 When [illegible] of a soldier at the first trial in a Civil [illegible] onsidered necessary on appeal, subject to the limitations laid down in rules (2) and (3)

5 The term "soldiers in (1) includes regimental warrant and non-commissioned officers and privates, both British and Indian (except native soldiers on leave and reservists not under training), but it does not include officers nor departmental or regimental followers[1]

Amendment —The words "and Air Force" were added to the title by Act X of 1927

Abetting mutiny or attempting to seduce a soldier, sailor or airman from his duty

131. Whoever[1] abets the committing of mutiny[2] by an officer, soldier, sailor or airman, in the Army[3], Navy[4] or Air-Force of the Queen[5], or attempts to seduce any such officer, soldier, sailor or airman from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Explanation —In this section the words "officer" "soldier" and "airman" include any person subject to the Army Act, The Indian Army Act 1911 or the Air Force Act, as the case may be

1 L H C P & O, Vol II, Ch XX, p 108

COMMENT.

The first part of this section relates to the offence of abetting mutiny. The offence contemplated is an abetment which is not followed by actual mutiny, or which, supposing actual mutiny follows, is not the cause of that mutiny.

1. **'Whoever'.**—See s. 139, *infra*, The offender must be a person not subject to the Indian Army Act, 1911.

2. **'Mutiny'.**—The offence of mutiny consists in extreme insubordination, as if a soldier resists by force, or if a number of soldiers rise against or oppose their military superiors, such acts proceeding from alleged or pretended grievances of a military nature. Acts of a riotous nature directed against the Government or civil authorities rather than against military superiors seem also to constitute mutiny[1]. Where P published an article in his newspaper purporting to be a letter from a sympathiser of native soldiers to their address and calculated to seduce soldiers of the Indian Army from their allegiance and their duty to the King-Emperor, and D abetted the same by printing the articles in his press, it was held that P and D were guilty of an offence under this section, and that publishing broadcast some 3,000 copies of the letter was an act amounting to an attempt[2].

3. **'Army'.**—The Indian Army Act of 1911 is a consolidated statute relating to the Government of His Majesty's Indian Forces.

4. **'Navy'.**—This includes Indian Marine service (s. 138). See Indian Marine Act (XIV of 1887).

5. **'The Queen'.**—See s. 13, *supra*.

Explanation.—The explanation was added by Act XXVII of 1870, s. 6, and was amended by Act X of 1927. The section is thus extended to non-combatants attached to and serving with the Army. The Army Act[3], 1881, applies to the English Army. Act V of 1869 is repealed by the Indian Army Act (VIII of 1911). The substantive offences of which the abetment is punishable under the Code are punishable under the Indian Army Act. For 'sailor' see the Naval Discipline Act[4]; and for 'airman', see the Air Force Act[5].

PRACTICE.

Evidence.—Prove (1) that the person abetted is an officer, etc., of the King's Army, Navy or Air Force.

(2) That the accused abetted him to commit mutiny; or attempted to seduce him from his allegiance.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission of mutiny by——, an officer (*or* soldier, *or* sailor *or* airman), in the Army (*or* Navy *or* Air Force) of the King-Emperor [*or* attempted to seduce—an officer (*or* soldier, *or* sailor *or* airman in the Army, (*or* Navy *or* Air Force) of the King-Emperor from his allegiance (*or* duty)], and thereby committed an offence punishable under s. 131 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

1 M. & M. 112.
2 *Pindi Das,* (1907) P. W. R. (Cr.) No. 37 of 1907.
3 44 & 45 Vic., c. 58.
4 29 & 30 Vic., c. 109.
5 7 & 8 Geo. V., c. 51.

Abetment of mutiny if mutiny is committed in consequence thereof

132 Whoever[1] abets[2] the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen, shall, if mutiny be committed in consequence of that abetment[3], be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

COMMENT

This section punishes the abetment of mutiny when mutiny is committed in consequence of that abetment It therefore prescribes enhanced penalty

1. **'Whoever'** —See s 139, *infra*

2. **'Abets'** —See s 107 *supra*

3 **'Committed in consequence of that abetment'** —An act or offence is committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment[1]

PRACTICE

Evidence —Prove (1) the abetment of mutiny as in s 131
(2) That mutiny was committed in consequence of such abetment

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session

Charge —I (*name and office of Magistrate etc*), hereby charge you (*name of the accused*) as follows —

That you, on or about the——day of——, at——, abetted the commission of mutiny by——, an officer (*or* soldier, *or* sailor, *or* airman) in the Army (*or* Navy, *or* Air Force) of the King Emperor and mutiny was committed in consequence of that abetment and thereby committed an offence punishable under s 132 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Abetment of assault by soldier sailor or airman on his superior officer when in execution of his office

133 Whoever[1] abets[2] an assault[3] by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen[4], on any superior officer[5] being in the execution of his office[6], shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

COMMENT.

This section punishes abetment of assault which is not committed The next section punishes similar abetment where the offence is committed

1. **'Whoever'** —See s 139, *infra*

2. **'Abets'** —See s 107 *supra*

[1] See Expln to s. 109, *supra*

3. **'Assault'.**—The assault here meant may probably be that which the Munity Acts and Articles of War provide against, namely, the striking a superior officer, or using or offering any violence against him when he is on duty. As to the definition of 'assault', see s. 351, *infra.*

4. **'The Queen'.**—See s. 13, *supra.*

5. **'Superior officer'.**—These words of course exclude from this provision such assaults as one private soldier may commit on another. But they clearly comprehend all officers whether commissioned or non-commissioned—for a non-commissioned officer is a superior officer in relation to a private soldier, as a Captain is to Subaltern, and the Commanding Officer of a Regiment to all the officers and men under his command[1].

6. **'Execution of his office'.**—It is an inseparable part of this offence that the officer should be assaulted while in the execution of his office. An officer is in the execution of his office not only when he is performing a prescribed duty, but also when he is discharging a duty arising out of the exigency of the moment. Thus an officer seeing a soldier out of quarters after hours, or improperly dressed or drunk in the streets of a town, or transgressing any order or usage of the service, would at all times be in the execution of his duty and therefore of his office, in ordering the soldier to his barracks or directing such other measures as might be necessary. It must, however, be remembered that an important ingredient in the soldier's offence is, that he offers violence knowingly to his officer. If he strikes a person whom he or his abettor really does not know to be an officer, the offence of abetment which is here made punishable so severely, has not been committed by the person who abets the blow[2].

PRACTICE.

Evidence.—Prove (1) that the accused was guilty of acts of abetment.

(2) That the person abetted was an officer, etc., in the King's Army, Navy or Air Force.

(3) That the assault was to be on the superior officer of the person abetted.

(4) That such officer was at the time in the execution of his duty.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, abetted an assault by —an officer (*or* soldier, *or* sailor, *or* airman) in the Army (*or* Navy, *or* Air Force) of the King-Emperor on——a superior officer being in the execution of his office, and thereby committed an offence punishable under s. 133 of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Abetment of such assault if the assault is committed.

134. Whoever[1] abets[2] an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Queen[3], on any superior officer being in the execution of his office, shall, if such assault[4] be committed in consequence of that abetment[5], be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

1 M. & M. 113. 2 *Ibid.*

COMMENT.

This section punishes the master or person in charge of a merchant ship on board of which a deserter has concealed himself. The master is liable even though he is ignorant of such concealment.

In this section it is expressed as part of the definition of the offence that the abettor knows the quality of the act abetted, that is, he knows it to be an act of insubordination.

1. **'Whoever'.**—See s. 139, *infra*.

2. **'Abets'.**—See s. 107, *supra*.

3. **'Queen'.**—See s. 13, *supra*.

4. **'Act of insubordination'.**—Any wilful breach of discipline on the part of a soldier, sailor, or airman will constitute an act of insubordination. The Army Act of 1881[1], s. 10, defines what insubordination is. It says:—

"Every person subject to military law who commits any of the following offences; that is to say,

(1.) Being concerned in any quarrel, fray, or disorder, refuses to obey any officer (though of inferior rank) who orders him into arrest, or strikes or uses or offers violence to any such officer; or

(2.) Strikes or uses or offers violence to any person, whether subject to military law or not, in whose custody he is placed, and whether he is or is not his superior officer; or

(3.) Resists an escort whose duty it is to apprehend him or to have him in charge; or

(4.) Being a soldier breaks out of barracks, camp, or quarters, shall on conviction by court-martial be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned".

The Indian Army Act, 1911, s. 28, also specifies the cases of insubordination.

PRACTICE.

Evidence.—Prove (1) that the act was one of insubordination.

(2) That the person guilty of such act was an officer, etc., in the King's Army, Navy, or Air Force.

(3) That the accused abetted such officer in doing such act.

(4) That the accused at the time knew the same to be an act of insubordination.

(5) That such act of insubordination was committed in consequence of such abetment.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, abetted what you knew to be an act of insubordination by——, an officer (*or* soldier, *or* sailor *or* airman) in the Army (*or* Navy *or* Air Force) of the King-Emperor and such act of insubordination was committed in consequence of the said abetment, and thereby committed an offence punishable under s. 138 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] 44 & 45 Vic. c. 58.

Application of foregoing sections to the Indian Marine Service

138A. The foregoing sections of this chapter shall apply as if Her Majesty's Indian Marine Service were comprised in the Navy of the Queen

COMMENT

This section was inserted by the Indian Marine Act, 1887[1] It merely extends the significance of the expression "Navy of the Queen"

Persons subject to Articles of War

139 No person subject to the Army Act, the Indian Army Act, 1911, the Naval Discipline Act or the Air Force Act, is subject to punishment under this Code for any of the offences defined in this chapter

COMMENT

The object of this section is to specify definitely that persons subject to Military Law will not be dealt with under the Code for offences defined in this chapter

Wearing garb or carrying token used by soldier sailor or airman

140 Whoever, not being a soldier, sailor or airman in the Military, Naval or Air service of the Queen[1], wears any garb or carries any token resembling any garb or token used by such a soldier, sailor or airman[2] with the intention that it may be believed that he is such a soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both

COMMENT

The gist of the offence herein made penal is the intention of the accused wearing the dress of a soldier for the purpose of inducing others to believe that he is in service at the present time Merely wearing a soldier's garb without the specific intention is no offence Othewise actors putting on every kind and shade of uniform will be hauled up under this section Similarly, persons using cast off uniforms of soldiers will not be liable

No fraudulent intention is made a part of the definition

1. **'The Queen'** —See s 13, *supra*

2 **'Soldier, etc '**—This section, assuming that soldiers only and not sailors wear a distinguishing dress, accoutrements etc , provides a punishment for those who personate soldiers

PRACTICE

Evidence —Prove (1) that the accused wore the garb or carried the token in question

(2) That such garb or token resembled that used by soldiers or sailors or airmen

(3) That the accused was not a soldier or sailor or airman

(4) That the accused wore the garb or carried the token with the intention that it might be believed that he was a soldier, etc

[1] Act XIV of 1887, s. 79

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, not being a soldier *or* sailor *or* airman in the Military (*or* Naval *or* Air) service of the King-Emperor, on or about the——day of——, at——, wore (*specify the garb*) [*or* carried——, a token resembling (*specify it*) (*or* used by such soldier or sailor or airman)] with the intention that it might be believed that you were such a soldier (*or* sailor *or* airman), and thereby committed an offence punishable under s. 140 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER VIII

Of Offences against the Public Tranquillity

These offences hold a middle place between State offences on the one hand, and crimes against person and property on the other Many of the offences made punishable by other Chapters of the Code involve in their commission a disturbance of the public peace But the present Chapter punishes especially unlawful assemblies of persons who whether they assemble tumultuously or otherwise have a common unlawful purpose in their minds the execution of which will disturb public order and excite alarm[1]

This Chapter deals with assemblies as a menace to the public peace, in a simple or in an aggravated form (ss 141 142 143 144) with persistence in such menace (ss 145 151) and with actual disturbance of the peace by rioting in a simple form (ss 146 147) or an aggravated form (s 148) It also deals (s 149) with the responsibility of each member of an unlawful assembly for any offence committed by the members comprising it The remaining sections deal with connected offences and with offences connected with affrays[2]

As to the duty to give information of offences punishable under s 143 144 145 147 or 148 see the Code of Criminal Procedure ss 44 and 45

As to dispersion of unlawful assemblies see the Code of Criminal Procedure, Chapter IX

141 An assembly of five or more[1] persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

Unlawful assembly

First[3] —To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant Governor, or any public servant in the exercise of the lawful power of such public servant, or

Second[4] —To resist the execution of any law or of any legal process, or

Third[5] —To commit any mischief or criminal trespass, or other offence, or

Fourth[6] —By means of criminal force, or show of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right or

Fifth[7] —By means of criminal force, or show of criminal force to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do

Explanation[8] —An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly

[1] M & M 118

[2] *Rasul* (1888) P R No 4 [illegible]

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues[9] in it, is said to be a member of an unlawful assembly.

Being member of unlawful assembly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Punishment.

COMMENT.

The essence of an offence under s. 143 is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit[1]. Thus in the case of a house trespass by members of an unlawful assembly the conviction of the accused under s. 143 is not illegal even though the offence under s. 447 had been compounded[2].

The intention indicated by the heading of this Chapter is to constitute certain acts, which endanger the public peace, offences against public tranquillity.

Scope of s. 141.—"In construing section 141, regard must be had not only to the general intention deducible from the heading of the chapter, but also to the specific mode in which the Legislature intended to carry out that intention"[3]. The common object of the assembly must be one of the five objects mentioned in the section. Thus, an assembly for the purpose of gambling does not constitute an unlawful assembly[4].

1. **'Five or more'.**—The assembly must consist of five or more persons, having one of the five specified objects as their 'common object'[5]. Where of five persons convicted, it was found as regards two of them that there had been *no common object it was held that the conviction of the others could not be maintained* as there must have been five persons who had a common object before there could be an unlawful assembly[6]. Where it is found by the Court that the number of persons who committed an offence under s. 147 was five or more, the acquittal of some of the accused cannot dispel the application of s. 147 to the others. The essential question in such a case is whether the number of persons who took part in the crime was five or more than five. The identity of the persons who were members thereof relates to the determination of the guilt of the individual accused[7].

An unlawful assembly according to common law in England is an assembly of three or more persons for purposes forbidden by law.

2. **'Common object'.**—The essence of the offence is the common object of the persons forming the assembly. Whether the object is in their minds when they come together, or whether it occurs to them afterwards, is not material. But it is necessary that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. It seems also that there must be some present and immediate purpose of carrying into effect the common object; and that a meeting for deliberation only, and to arrange plans for future action is not an unlawful assembly[8]. Where the members

1 *Malli Venkanna*, (1922) 46 Mad. 257.
2 *Ibid.*
3 Per Muttusami Ayyar, J., in *Tirakadu*, (1890) 14 Mad. 126, 130.
4 (1880) 1 Weir 66.
5 *Koura Khan*, (1868) P. R. No. 34 of 1868; *Koylash Chunder Dass*, (1873) 20 W. R. (Cr.) 78; *Gholam Mahomed*, (1874) 22 W. R. (Cr.) 17; *Sumeshar Rai*, (1893) 13 A. W. N. 169.
6 *Vyapuri Chetti*, (1909) 5 M. L. T. 285.
7 *Feroze Din*, (1928) 29 Cr. L. J. 859.
8 M. & M. 119; *Koura Khan*, sup.

of an assembly merely agree as to what they should individually do, when, in the case of each person separately, a demand is made for the payment of a certain tax, the assembly does not come within the definition of an unlawful assembly[1] There is a difference between object and intention, for, though the object of an assembly is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful[2] Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not [illegible] mand, but also according to the extent

[illegible] sembly unless he is aware of the facts that render that assembly an unlawful one and intentionally joins or continues in it[4]

In order to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object, but must normally be based on more evidence than the mere acts themselves[5]

3. First clause.—The third clause of s 121-A provides for a conspiracy to overawe Government of India

'To overawe'.—A person kept by superior influence in awe, so that he fears to do that which he has a mind and will to do and which the law empowers him to do, is overawed But the common object which makes an assembly 'unlawful' is an intent to overawe by criminal force, or by show of criminal force. To carry a conviction under this head the common object of the persons composing the assembly must have been to overawe a public servant, the mere fact that their action did overawe such public servant is not in itself sufficient A crowd of persons, assembling to see what the police officers were doing in arresting a person who had escaped from lawful arrest, who do not use force or show of force, does not form an unlawful assembly[6]

As to the definition of 'criminal force' see s 350, of 'Government of India', s 16, of 'Government, s 17, of 'Presidency', s 18, of 'public servant', s 21

4. Second clause.—"Resistance to some law or legal process.. *connotes* some overt act, and mere words, when there is no intention of *carrying them into* effect, are not sufficient to prove an intention to resist, the *conduct of the* assembly and the refusal of the members of it to disperse after being *ordered to do* so constituted an overt act and established a common object to *resist within the* meaning of the second clause"[7]

'Law'.—"A notification issued by an executive authority in exercise *of a* power conferred by statute is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment"[8].

Under this clause any resistance to the carrying out of the provisions of any law or to the execution of legal process is deemed to be illegal. The act resisted must be a legal act This clause has not the effect of making an assemblage of persons an unlawful assemblage, if the object with which they assembled was a perfectly legal one[9]

1 [illegible] 103) 27 [illegible]

2 [illegible]

4 [illegible]

5 [illegible]

6 *Lohi* (1924) 22 A. L. J 22.

7 Per Mullick, J, in *Abdul Hamid*, [illegible] Pat 134 135

8 Per Mullick and [illegible], JJ. [illegible] p 135 Das, J, *contra*

9 *Uma Charan* [illegible]

Cases.—Resistance to an unlawful search.—Where a number of persons resisted an attempt to search a house which was being made by officers, who had not the written order investing them with the power to do so, it was held that the persons resisting the attempted search could not be lawfully convicted under s. 143[1]. It was held similarly where the accused in defence of their property and of their rights, real or supposed, resisted the execution of an order which was made without authority by a Collector, and in so resisting did not use more force than was necessary for the purpose[2].

Resistance to an illegal arrest.—Where a party of policemen, on receiving information that certain persons were waiting near a railway line with the intention of robbing a train, arrived at the scene and finding the accused and certain other persons sitting or roaming about near the railway line, attempted to arrest those present and a fight ensued but the accused were eventually secured and taken to the police station and they were subsequently charged with and convicted of an offence under s. 147, it was held that the police had no justification for attempting to arrest the accused and that consequently in resisting the arrest the accused were not guilty of rioting. The Court said: "The detention or arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is one of the most serious encroachments upon the liberty of the subject which can well be contemplated"[3].

Resistance to an order under the Police Act.—Where the Superintendent of Police issued a notice under s. 30 of the Police Act, prohibiting any processions, associations, or assemblies started or formed by any person or any class of persons within a certain area, otherwise than under a license, for a period of three months, it was held that if five persons joined or remained in any unlicensed procession, association, or assembly within such area, after it was ordered to disperse, and if such persons were acting together with the common object that the person who had convened the assembly or association or promoted the procession should resist the execution of the Superintendent's order, then each of such five persons would be a member of an unlawful assembly unless he was unaware of the fact that no license had been obtained[4].

5. Third clause.—This clause specifies only two offences, viz., mischief and criminal trespass, but the words "or other offence" seem to denote that all offences are included though only two are enumerated in a haphazard way. This construction is borne out by the fact that the word "offence" has been given a wider significance in this clause. 'Offence' under this clause means a thing punishable under the Code, or under any special or local law if punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine (s. 40).

As to the definition of 'mischief,' see s. 425; of 'criminal trespass', s. 441.

An assembly of five or more persons becomes an unlawful assembly if the common object is not to arrest persons who commit an offence but to subject to humiliation persons who intervene on behalf of the offenders[5].

6. Fourth clause.—The act falling within the purview of this clause is made punishable owing to the injurious consequences which it is likely to cause to the public peace. But this clause does not take away the right of private defence of property which belongs naturally to every man and which has been legalized and justified by the Code. It ought not to affect cl. (2) of s. 105, which allows a

1 *Narain*, (1875) 7 N. W. P. 209.

2 *Mikka Jogi*, (1883) 1 Weir 64. See *Uma Charan Singh*, (1901) 29 Cal. 244.

3 *Ramprit Ahir*, (1925) 7 P. L. T. 218.

4 Held by Mullick and Coutts, JJ. (Das. J., *dissentiente*), in *Abdul Hamid*, (1922) 2 Pat. 134; *Bhalchandra Ranadive*, (1929) 31 Bom. L. R. 1151.

5 *Ramsahay Ram*, (1920) 31 C. L. J. 476.

person to recover the property carried away by theft It has no application to a case where a person in lawful possession of any property proposes to use force in order to maintain his possession The clause speaks of "to take or obtain possession of any property". It does not speak of maintaining possession or resisting an attempt by another to take possession It has no application to a party who uses force to defend property in his possession Such a person is not enforcing a right,

have been infringed, a person who has not acquired any right of way or light and whose rights have not been in any way infringed cannot take the law into his own hands and pull down a wall constructed by his neighbour merely to maintain the *status quo*[3]

'To enforce any right or supposed right'.—This would seem to make a division into (1) rights in actual enjoyment when interfered with, (2) rights claimed though not in actual enjoyment when interfered with[4] The phrase 'to enforce a right' can only apply when the party claiming the right has not possession over the subject of the right, and therein lies the distinction between enforcing a right and maintaining a right[5]. The true import of the phrase relates to an initial act when it is done in furtherance of any

a position already achieved

entitled to the land, but not in

but if he enters by force in such a manner as to provoke a breach of the peace, then he takes the consequences, because he has no right to take the law in his own hands[7]. Persons who are not animated with the intention to enforce a right, or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which is being at the time exercised, do not, in preventing an encroachment, commit an offence under this section[8] Where five or more persons assembled for maintaining by force or show of force a right which they bona fide believe they

1 *Inderjit*, (1923) 26 Cr L J 43

6 *Baij Nath*, (1924) 1 O W N 588, 27 O C 232

7 *Ramchandra Appaji*, Criminal Appeals Nos 146 149 of 1911, decided on June 21, 1911, by Chandavarkar and Hayward, JJ (Unrep Bom)

8 *Shunker Singh* v *Burmah*, (1875) 23 W R (Cr) 25, *Birjoo Singh* v *Khub Lall*, (1873) 19 W R 66, *Denonath Ghattack* v *Rajcoomar*

importance, and a right to possession, or constructive possession, is not generally of much importance[1].

"The words...'to enforce a right or a supposed right' show that it is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace"[2]. "The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help,...In the domain of penal law, that right can extend to no cases not expressly defined by the law itself. The fact, therefore, of the illegality of the act of the opponent of the accused is wholly indifferent, unless it brings itself within the category of those in which self-defence is permitted"[3].

Cases.—Disputes regarding possession of land.—Where there was a dispute of long-standing between the accused and certain other parties regarding the possession of certain land, and the accused went to sow the land with indigo, *accompanied by a body of men armed with clubs and who kept off the opposite* party by brandishing their weapons while the land was being sowed, it was held that they were guilty of the offence[4]. Where two parties were entitled to joint possession of a property but one party having been out of possession their servants with thirty or forty other men went armed with clubs to take forcible possession of the property and succeeded in getting it without having had to use any force, it was held that the servants were guilty of this offence[5]. Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with clubs prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently, it was held that the common object was not to enforce a right, but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful[6].

Procession.—Where the accused assembled and forcibly interrupted a procession upon the ground that it was a nuisance or annoyance to them or their community, it was held that their act clearly fell within clause (4) of s. 141[7]. A headman and eighteen villagers conducted a funeral procession along a public road with the object of vindicating their right to use the road, and intending to resist obstruction. It was not proved that the party was armed, but some of its members used threatening language. It was held that the use of threats made the funeral party an unlawful assembly[8]. Where a party goes out armed for the express purpose of having a fight and its object is not so much to conduct a religious procession as to have a fight, the members of the party constitute an unlawful assembly and if they use force or violence, they are guilty of rioting under s. 147 of the Code. But the mere knowledge that a religious procession is going to be opposed by force is not in all cases sufficient to constitute the members of the procession an unlawful assembly[9].

Illegal seizure.—Paddy belonging to a society to which the first accused belonged was stored in a granary in a street. The treasurer of the society attempted to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows

1 *Jairam Mahton*, (1907) 35 Cal. 103.

2 Per Muttusami Ayyar, J., in *Tirakadu*, (1890) 14 Mad. 126, 130.

3 Per Holloway, J., in (1873) 7 M. H. C. App. 35.

4 *Peary Mohun Sircar*, (1883) 9 Cal. 639.

5 *Bepin Behari Guha* v. *Pranakul Majumdar*, (1906) 11 C. W. N. 176.

6 *Silajit Mahto*, (1909) 36 Cal. 865.

7 (1869) 5 M. H. C. App. 6; 1 Weir 27.

8 *Nga Kyaw Yaung*, (1905) U. B. R. (P. C.) (1904-06) 21.

9 *Dilli*, (1925) 2 O. W. N. 589.

being struck It was held that no offence was committed[1] Where a large crowd of Hindus appeared in a village and threatened to take away the cows of the Mahomedans which they had collected for sacrifice on the occasion of Bakr-id it was held that they were guilty of an offence under this section[2]

Illegal construction of a dam—The complainant s party without the permission of the accused constructed a dam across a pyne exclusively belonging to the accused who had obtained an injunction from the civil Court restraining the complainant s party from interfering with the accused in their use and occupation of the pyne The accused in attempting to cut the dam were opposed by the complainant s party two of whom were struck by the accused and the accused were convicted of rioting and of causing grievous hurt It was held that after the civil Court decree and injunction the accused could not be held to be enforcing a right within the meaning of clause (4) of this section and the presence of the complainant s party in opposing the accused was a criminal trespass which entitled the accused to a right of private defence[3]

Taking water by force—Where five persons assembled together at a water head armed with deadly weapons to take water by force and to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose it was held that they constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in pursuance of their common object and that as every one of them knew that the weapons were likely to be used with deadly effect they were all responsible if any one of them inflicted a fatal injury[4]

Preventing cow sacrifice—The leaders of the Hindu and Mahomedan communities of a place entered into an agreement by which the Mahomedan community undertook not to sacrifice cows publicly The Hindus apprehending such sacrifice assembled with deadly weapons and as a result a riot ensued and some Mahomedans died of injuries It was held that the object of the assembly fell within the purview of this clause and that the members of the assembly could be charged and convicted for being members of an unlawful assembly[5]

7 **Fifth clause**—This clause is very comprehensive and applies to all the rights a man can possess whether they concern the enjoyment of property or not It differs from the preceding clause in the omission of any reference to a right or supposed right

The mere use of criminal force or show of criminal force by any person to take possession of any property is not sufficient to bring a case within this clause unless some criminal intent is proved against the persons so using force or show of force[6] Where therefore a District Board decided to replace a bridge across a *khal* which was out of repair by means of a road with pipes passing underneath for the flow of water and the owners of the bed of the *khal* objected to the laying of the pipe on the ground that it would obstruct the flow of water and removed the pipes placed there by the District Board it was held that the owners could not be convicted of this offence[7]

8 **Explanation**—An assembly which is lawful in its inception may become unlawful by the subsequent acts of its members[8] It may turn unlawful all of a sudden and without previous concert among its members[9] But an illegal act of

[1] *Ayya Annasamy Ayyar* (1901) 25 Mad 6?1

[2] *Suba Singh* (1916) 18 Cr L J 110

[3] *Ramnandan Prasad Singh* (1913) 17 C W N 113?

[4] *Hari Singh* (19?5) 7 L L J 5 6 ?6 P L R 8?0

[5] *Lachhmi Singh* (19?8) 29 Cr L J 567

[6] *Addaita Bhuia v Kali Das De* (190) 1? C W N 96

[7] *Ibid*

[8] *Khemee Singh* (1864) 1 W R (Cr) 19 *Lokenath Kar* (18 ?) 18 W R (Cr) 2

[9] *Ragho Singh* (190?) ? C W N 50?

one or two members, not acquiesced in by the others, does not change the character of the assembly[1].

An assembly which is lawful in itself does not become unlawful merely because the members know that their assembly would be opposed and a breach of the peace would be committed[2]. The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that they could not be convicted of being members of an unlawful assembly[3].

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence[4].

An assembly which is not unlawful in its inception does not become an unlawful assembly because of its refusal to obey an order to disperse[5]. An assembly does not become unlawful by reason of its lawful acts exciting others to do unlawful acts[6].

"No man can foresee at the commencement what course they, i.e., assemblies, will take, or what consequences will ensue. Though cases may occur in which the object of such assemblies is at first defined and moderate, they rapidly enlarge their powers of mischief; and from the natural effects of the excitement and ferment inseparable from the collection of multitudes in one mass, the original design is quickly lost sight of, and men hurry on to the commission of crimes, which at their first meeting they had never contemplated. The beginning of tumult is like the letting out of water; if not stopped at first, it becomes difficult to do so afterwards; it rises and increases, until it overwhelms the fairest and the most valuable works of man"[7].

9. **Section 142.**—Section 141 having explained what an unlawful assembly is, this section declares who may be said to be a member of such an assembly. Any one who joins an unlawful assembly or continues in it is a member of such assembly. If he pleads that he was there innocently, or merely as a harmless spectator, he must prove that he was there owing to no fault of his own and that he could not get out of the crowd[8].

R filed a prosecution against K, for enticing away his wife A. K claimed to be the husband of A, and denied the marriage of A with R. On the day of hearing R in company of several others forcibly seized A, put her in the carriage of one H and drove away. It was held that H, the carriage driver, had been rightly convicted under s. 147. He must have seen that the object of the unlawful assembly was to carry off A, and when he drove A off against her wish he joined the unlawful assembly and assisted the carrying out of the unlawful object for which it had assembled[9].

'Continues'.—Although individuals may in the first instance have associated themselves with a mob from motives perfectly innocent, nevertheless, if the mob is or becomes an unlawful assembly and the individuals in question take part in its proceedings, they will be liable as members of an unlawful assembly[10]. Where certain persons had assembled to prevent a procession by force from passing over a certain street, and they were ordered by the police to disperse but neglected to

1 *Dinobundo Rai*, (1868) 9 W. R. (Cr.) 19.
2 *Beatty* v. *Gillbanks*, (1882) 9 Q. B. D. 308.
3 *Ibid.*
4 *Mukka Muthrian*, (1915) 16 Cr. L. J. 743.
5 *Girdhara Singh*, (1921) 4 U. P. L. R. (L) 11.
6 *Muhammad Ibrahim*, (1928) 30 Cr. L. J. 38.
7 Extract from the charge of Tindal, L. C. J., to the grand jury of Bristol in 1832.
8 *Gendo Uraon*, (1927) 6 Pat. 828.
9 *Haji Baka*, (1908) 2 S. L. R. 6.
10 *Periapien*, (1883) 1 Weir 66.

do so it was held that they were guilty of the offence of being members of an unlawful assembly[1]

Exercise of lawful rights —When an attack is made on persons acting in the lawful exercise of their right over property they are entitled to the right of private defence and the only question that arises thereafter is whether any member of the party individually exceeded the right Persons exercising their lawful rights are not members of an unlawful assembly nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence In such a case each is liable only for his individual acts done in excess of such right[2]

Statutory application —See the Rangoon Police Act (Burma Act IV of 1899) s 38 (2)

PRACTICE

Evidence —Prove (1) that the assembly in question consisted of five or more persons

Where of five persons convicted it was found as regards two of them that there had been no common object it was held that the conviction of the others could not be maintained as there must have been five persons who had a common object before there could be an unlawful assembly and rioting[3]

(2) That the object of the persons so assembled (either at the time it became an assembly or during the time that it continued to be assembled) was any of the five objects mentioned in s 141

(3) That such object was common to the persons assembled[4]

It is necessary that the accused should have a reasonably distinct notice of the *common object* imputed to them and of the manner in which that common object is to be brought within the language of this section[5]

In order to establish the common intention of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence but such intention can be inferred from the circumstances of the case

five or more persons it is a perfectly valid and

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without taking any action the intention and common object of that crowd can only be inferred from the surrounding circum

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3 Vyapuri Chett (1909) . M L T 28.

4 Bhagiram Dome v Abar Dome (1888) 15 Cal 388.

5 Parakuh yal Ayamad (1923) 24 Cr L J 8..

6 Lajja (1907) 9 L L J 209

7 Jogi Raut (1907) 9 P L T 200

8 Loganathaiyar (1909) 6 M L T 17

common object regarding which the accused were never called upon to plead nor tried and to affirm the conviction[1].

(4) That the accused joined, or continued in, such assembly.

(5) That he did so intentionally.

(6) That he did so being aware of the above facts.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Power to disperse unlawful assembly.—Chapter IX of the Code of Criminal Procedure gives power to a Magistrate to disperse unlawful assemblies by using civil or military force[2].

Joint trial.—As a matter of procedure it is irregular to treat both parties to a riot as constituting one unlawful assembly, and to try them together inasmuch as they do not have one common object[3]. Members of each faction may be called as witnesses against their opponents[4]. Where members of two assemblies do not mingle together at any time or place, the mere fact that they have a common intention will not make them one assembly. The question whether two groups of men do or do not form one assembly is a question of fact in each case. Where two mobs start from different localities and operate independently and never come close to each other, they cannot be considered to be members of one assembly. though their object be the same[5].

Restoration of possession can be ordered.—Where possession of immoveable property is taken by force by an unlawful assembly the Magistrate can make an order directing restoration of possession[6].

Death of complainant.—The death of the complainant does not put an end to the prosecution. The trying Magistrate has a discretion in proper cases to allow the complaint to continue by a proper and fit complainant if the latter is willing[7].

Right of the Crown to prosecute.—A complaint for rioting or for being a member of an unlawful assembly discloses a non-compoundable offence for which the Crown alone in the interests of public peace and security has a right to prosecute. and a complainant has no independent right to have the guilty persons punished[8].

Charge.—The charge should state the common object of the assembly[9]. Omission to state it does not vitiate a conviction if there is evidence on the record to show it[10]. It is sufficient if it is specified in the complaint and found by the Court[11]. Such an omission is a mere irregularity which will vitiate the trial only if it has caused miscarriage of justice on the merits; and the test of such a miscarriage is whether the accused were prejudiced by the omission and had no notice during the trial of the case of the prosecution as to the common object so as to enable them to meet it in their defence and in cross-examination[12].

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt. whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unlawful assembly was to assault the persons to whom hurt was caused. It is not necessary to state that the common object was to cause simple or grievous hurt, as the case may be[13].

1 *Rahimuddi* v. *Asgarali*, (1900) 5 C. W. N. 31.

2 Criminal Procedure Code, ss. 127-132.

3 *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75.

4 *Mahomed Hoossein*, (1869) 1 N. W. P. 293; *Nawab*, (1881) P. R. No. 26 of 1881.

5 *Wajid Ali*, (1927) 28 Cr. L. J. 337.

6 *Rameshwar Singh*, (1925) 7 P. L. T. 285.

7 *Mahomed Azam*, (1925) 28 Bom. L. R. 288.

8 *Malayil Kottayil Koyassam Kutty*, (1917) 18 Cr. L. J. 329.

9 (1865) 4 W. R. (Cr. L.) 9; *ibid*, 10; *Tafazzul Ahmed Chowdhry*, (1899) 26 Cal. 630.

10 *Kadrutulla*, (1912) 39 Cal. 781.

11 *Yeshvant Satra*, (1926) 28 Bom. L. R. 497.

12 *Shivprasad Manilal*, Criminal Reference No. 92 of 1910, decided on January 20, 1911. by Chandavarkar and Heaton, JJ. (Unrep. Bom.)

13 *Chhanka Dhanuk*, (1927) 6 Pat. 832.

The charge should run thus —

I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, were a member of an unlawful assembly, the common object of which was (*specify the object*), and thereby committed an offence punishable under s 143 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Joining unlawful assembly armed with deadly weapon

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence[1], is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT

The risk to the public tranquillity is aggravated by the intention of using force evinced by carrying arms This section, therefore, provides for an enhanced punishment where the member of an unlawful assembly is armed with a deadly weapon

Scope —The enhanced punishment under the section can only be inflicted on that member of an unlawful assembly who uses a weapon of offence The word 'whoever' justifies this interpretation

1. 'Weapon of offence'.—That is, a weapon which under the present circumstances and at the present time (during the existence of the unlawful assembly) is an offensive weapon, notwithstanding that it might be otherwise at a different time and place' A crowd of about 100 persons, including the accused, had assembled together armed with bill hooks and sticks, but it dispersed at once on seeing the police On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and having regard to the weapons with which they were armed, he convicted the accused under this section The High Court held that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by s 141, and that the accused were entitled to be acquitted[2]

Sections 114 and 144.—When one person instigates another to join an unlawful assembly armed with a deadly weapon and afterwards joins the unlawful assembly himself, he may be punishable under this section, read with s 114, even though he was not himself armed with a deadly weapon[3]

PRACTICE

Evidence.—Prove points (1) to (6) as in s 143, and further

(7) That the accused was armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate

Charge —I (*name and office of Magistrate, etc*), hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, being armed with a deadly weapon, to wit, [*or* armed with something which, used as a weapon of

[1] M & M 123
[2] *Peeli nath v Fea in*, (1900) 24 Mad 124
[3] *Srihari Shome v Lal Khan*, (1900) 5 C W N 250

offence, is likely to cause death, to wit—] were a member of an unlwful assembly, and thereby committed an offence punishable under s. 144 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Joining or continuing in unlawful assembly knowing it has been commanded to disperse.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse[1], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section and s. 151 are connected with each other so far as the principle underlying both of them is concerned. Section 127 (1) of the Code of Criminal Procedure says: "Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly".

Section 188 of the Penal Code provides for the disobedience of any lawful order promulgated by a public servant. This section and s. 151 deal with spelcial cases as the disobedience may cause serious breach of the peace.

1. **'Commanded in the manner prescribed by law to disperse'.**—This expression means in the city of Bombay, commanded as prescribed in s. 40 (1) of the City of Bombay Police Act, 1902. It cannot be construed in a wider sense so as to include a command by a Magistrate to disperse without any order having been given by an officer in charge of a police-station[1].

PRACTICE.

Evidence.—Prove points (1) to (6) as in s. 143; and further

(7) That such unlawful assembly had been commanded to disperse.

(8) That such command to disperse was in the manner prescribed by law.

(9) That the accused joined, or continued in such unlawful assembly after it had been commanded to disperse.

(10) That the accused did so, knowing that it had been commanded to disperse.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

The prosecution should give formal evidence to show that the accused had the common object to resist the execution of a lawful order and the accused should have an opportunity to meet the case in the trial Court, particularly when the charge framed against him does not mention that common object[2].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, joined (*or* continued in) an unlawful assembly, knowing that such assembly had been commanded in the manner prescribed by law to disperse, and thereby committed an offence punishable under s. 145 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

1 *Keshav Govind*, (1921) 23 Bom. L. R. 350, Bom. Cr. C. 47.

2 *Abdul Hamid*, (1922) 2 Pat. 134.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof[1], in prosecution of the common object[2] of such assembly, every member of such assembly is guilty of the offence of rioting.

Rioting

147. *Whoever is guilty of rioting, shall be punished with* imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for rioting

COMMENT.

The basis of the law as to rioting is the definition of an unlawful assembly, a riot being simply an unlawful assembly in a particular state of activity[1], that activity being accompanied by the use of force or violence It is only the use of force that distinguishes rioting from an unlawful assembly

Ingredients.—There are two essentials which make every member of an unlawful assembly guilty of rioting—

1 Use of force or violence by an unlawful assembly or by any member thereof

2 Such force or violence should have been used in prosecution of the common object of such assembly

1. 'Force or violence used by an unlawful assembly, or by any member thereof'.—As to the meaning of 'force', see s 349 It is not necessary that the force or violence should be directed against any particular person or object[2] The use of any force, even though it be of the slightest possible character, by any one of an assembly once established as unlawful constitutes rioting[3] A person who is the leader of an unlawful assembly whose common object is to assault passers by commits the offence of rioting[4] Thus if a husband and his friends take possession of his wife by force and violence they are guilty of rioting[5] Actual use of force, and not merely a show of force, is necessary Where a number of men who are assembled at a certain place run away on being attacked by the opposite party, they are not guilty of rioting[6].

'Violence' —This word is not restricted to force used against persons only, but it extends also to force used against inanimate objects[7] Thus, if an unlawful assembly came together for the purpose of pulling down a man's house, and proceeded to carry out the object, they could be said to have used violence Similarly, where the accused struck at the door of the complainant who fled away to save himself from being beaten, it was held that they had used violence[8] Pulling down a toddy shop and cutting and destroying spatts of toddy trees are enough to show that violence was used[9]

'Unlawful assembly'.—See s 141, *supra*

'Any member thereof' —Whether only ...
assembled use the force, the penal conseque...
be otherwise, however, if the force or viole...

1 *Rasul*, (1888) P R No 4 of 1889
2 *Ghani Khan*, (1918) 21 O C 134
3 *Koura Khan*, (1868) P. R No 34 of 1868, *Ramadeen Doobay*, (1876) 26 W R (Cr) 6
4 *Sujatali Nyamatali*, (1921) 24 Bom. L. R 110
5 *Askur*, (1864) W R (Gap No) (Cr) 12
6 *Mahomed Ishaq Khan*, (1904) 1 A L. J. 602
7 *Samaruddi*, (1912) 40 Cal 367, *Rasul*, (1888) P R No 4 of 1889
8 *Venkatasubbaier*, (1922) 44 M. L. J 407.
9 *Marimuthu Naidu*, (1923) 32 M. L. T. 315

Private defence —It is often very difficult to decide how far the right of ... But it is settled that ... premeditated on both ... fight, it is immaterial ... cular party was acting

... inal force is no defence to a charge of rioting, unless the circumstances ... at a right of self defence arises[3]

If the common object of an assembly is to enforce the right or supposed right of private defence of person or property, and force is used in prosecution of the common object to enforce that right by means of criminal force, or show of such force, rioting is committed, within the terms of the law, unless circumstances exist which give occasion for the exercise of the right of private defence and this right is exercised within the limits prescribed by law[4].

The party of the accused accompanied by R went armed with clubs to fish in a tank in which R had a two annas share The complainant, who with some other co sharers represented an eleven annas interest in the tank went there with some of these co-sharers to protest on the ground that the accused had no share or interst in the tank A fight ensued in the course of which some of the complainant's party received slight injuries It was held that the accused were guilty of rioting and voluntarily causing hurt[5] The accused went with three ploughs on land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants, and to throw them away While they were thus in actual but ... and his party went on the land and tried ... was held that the accused ... e complainant's party was ... orary occupation[6] Where ... more than twe ... right of one of ... and after they ... that person, who was consequently attacked and beaten by some of ... as a result of a blow on the head, it was held that the assembly was an unlawful assembly[7].

The accused, on receiving information that the complainant s party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question While they were engaged in ploughing, the complainant's party came up and interfered with the ploughing A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt It was held that the accused were justified in taking such precautions as they thought were required to prevent the aggression, and that they could not be held to be members of an unlawful assembly[8] Where the accused were maintained in possession of certain lands, including a homestead

1 *Prag Dat*, (1898) 20 All 459
2 *Kalee Beparee*, (1878) I C L R 521, *Saadullah* (1923) 6 L L J 170
3 (1873) 7 M H C App 35, 1 Weir 58
4 *Rasul*, (1888) P R No 4 of 1889
5 *Anant Pandit* v *Madhusudan Mandal*, (1899) 26 Cal 574 *Ganouri Lal Das* (1889) 16 Cal 206, dissented from in *Veerabadra Pillai*, (1927) 51 Mad 91, *Allahdad* (1869) P R No 1 of 1870
6 *Jairam Mahton*, (1907) 35 Cal 103
7 *Agra*, (1914) P L R No 219 of 1915 P W R (Cr) No 69 of 1914, P R No 37 of 1914
8 *Pachkauri* (1897) 24 Cal 686, *Fateh* ... (1916 ...

under s. 145 of the Criminal Procedure Code, and the opposite party unlawfully attempted to take possession of some huts standing thereon, whereupon the accused came with an armed body and demolished the huts, and on being resisted by the opposite party wounded some of them, it was held, by the majority of the Court, that they were justified in taking precautions and using such force as was necessary to prevent aggression by the opposite party[1].

Where, one K being assaulted by B, a number of persons rushed to the scene and a fracas occurred in which B was killed, and K and the other persons forming the assembly were convicted of rioting, it was held that they were not guilty of rioting as the common object of the crowd was to rescue K and not to assault B[2]. In so far as excessive force is used by some members of the assembly the users of such force alone are liable to be punished for the assaults committed by them and not the other members of the assembly and in the absence of proof as to who actually dealt the fatal blow to the original assailant, no member of the assembly is punishable in respect of the blow[3].

See Comment and Cases on ss. 99 and 141, *supra*.

CASES.

Resistance to distraint.—Where a landlord. who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad. Act VIII of 1865), distrained his cattle for arrears of rent, the assistance of the police having been procured for the purpose, and the tenant with others forcibly obstructed the removal of the cattle, it was held that they were guilty of rioting[4]. But obstruction offered to a distraint by a landlord when no rent was in arrear was held to be no offence[5].

Resistance to a public officer.—N, S and G were appointed special constables under s. 17 of the Police Act, 1861. A Police Inspector accompanied by some police went to their village and informed them that they had been so appointed, and requested them to accompany him to a police-station which they declined to do. The Inspector then had N arrested, whereupon N shook himself free, and N, S and G with other persons, who had assembled, abused and threatened the police and compelled them to withdraw from the village. It was held that the refusal of N to accompany the Inspector was not an offence for which N could be arrested, and, as the police when obstructed were not acting in lawful discharge of their duty, none of the persons concerned could be convicted of an offence under s. 353, but they were guilty of rioting under this section.[6]

Where a Sub-Inspector of Police, on receiving information of the commission of a dacoity, reached the house of one of the alleged offenders, accompanied by the complainant and the village officers, but without a search warrant, whereupon they were beaten by the accused who were charged with, and convicted of, rioting, with the common object of resisting the search, assault and causing hurt, under ss. 147, 323 and 353; it was held that the search was illegal, and that the common object having failed, the conviction under s. 147 was bad[7]. But where certain police-officers acting bona fide under a defective search warrant were resisted by more than five persons and hurt was caused, the former Chief Court of the Punjab held that they were guilty of an offence under s. 147 read with s. 99 if the common object was to cause hurt and hurt was caused[8]. A complaint having been lodged against two persons under s. 498 for abduction of K, the complainant's daughter-in-law, the Magistrate ordered the issue of a warrant for the arrest of K, apparently intending to act under s. 90 of the Code of Criminal Procedure, but the

1 *Poresh Nath Sircar*, (1905) 33 Cal. 295.
2 *Ambika Singh*, (1921) 1 Pat. 212.
3 *Nawab*, (1928) 10 L. L. J. 298, 29 P. L. R. 727.
4 *Ramayya*, (1889) 13 Mad. 148.
5 (1875) 8 M. H. C. App. 11; 1 Weir 56.
6 *Raman Singh*, (1900) 28 Cal. 411.
7 *Bajrangi Gope*, (1910) 38 Cal. 304.
8 *Gaman*, (1913) P. R. No. 16 of 1913.

warrant erroneously charged K herself with an offence under s 498 Under this warrant the Head Constable arrested K and had taken her to a distance of about 200 *kadams* when a large concourse of people assembled, amongst whom were the accused, who took away the woman from the custody of the Head Constable and the constables with him, and inflicted certain injuries upon them It was held that the accused were rightly convicted of an offence of rioting[1]

Preventing cow-killing —Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing 'wrongful gain' to themselves or wrongful loss' to the owner of the cattle but for the purpose of preventing the killing of the cows it was held that they were guilty not of dacoity but of rioting[2] But the authority of this case has been shaken by a subsequent decision of the same High Court In the later case a large body of Hindus acting in concert and apparently under the influence of a religious feeling attacked certain Mahomedans who were driving cattle along a public road, and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners It was held that the offence of which the Hindus were guilty was dacoity and not merely rioting[3]

Recovering possession of cattle —Persons whose common object was by means of criminal force to recover possession of their cattle seized for trespass and who made use of such force and took away their cattle, were held guilty of rioting[4]

PRACTICE.

Evidence —Prove (1) that five or more persons were assembled

In the absence of a definite finding that five or more people took part in the occurrence, a conviction for rioting cannot be sustained[5]

(2) That such assembly was, when it was convened or subsequently became, unlawful, having any one of the five objects specified in s 141

There must be a finding as to the existence of an unlawful assembly[6]

(3) That such object was the common object of those composing such assembly[7]

It is essential to sustain a conviction that the persons forming the unlawful assembly should be animated by a common object, and in the absence of such a finding the conviction is not sustainable and ought on that ground alone to be set aside[8] Where the common object has not been sustained the High Court in a reference under s 307 of the Criminal Procedure Code cannot invent another common object in order to support the conviction[9]

(4) That the accused, or any member of such unlawful assembly, used force or violence

(5) That such force or violence was used in the prosecution of such common object

In cases of rioting it often happens that the Court may consider that the story told by the prosecution is false in some of its details, but is nevertheless

... 1917 P R N ... 1918 (Cr) 21

[5] *Ramaswami Tevan*, (1921) 14 L W ... 30 M L T (H C) 18, *Swaminathan* ... (1922) 16 L W 526, *Ali Muhammad* ... 5 L L J 475

[6] *Mahesh Dutt*, (1919) 21 Cr L J ...

[7] *Sabir*, (1894) ... Cal ..., ... (1922) 35 C L J ..., ... C W N ...

[8] *Paresh Nath* ..., (19..) ...

[9] *Akbar* ..., (19..) ...

sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution, and which was never suggested to the accused as being the case they had to meet[1].

In a charge of rioting where a number of men are accused, the Magistrate should deal with the case of each of the accused separately or discuss the evidence against each of the accused, especially when the evidence against each of the accused is by no means equally strong[2].

Where the evidence of the prosecution is interested and where a considerable amount of enmity exists between the factions, the Court must scrutinize the evidence very carefully[3].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable[4]—Any Magistrate.

Separate trial.—Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, as they had not one common object within the meaning of s. 141; and each party should be tried separately[5].

Cumulative sentences.—Separate sentences may be passed under this section and s. 323 (causing hurt)[6]; or under this section and s. 325 (causing grievous hurt)[7]. The Calcutta High Court in a case held that a double sentence under this section and s. 353 was illegal where the force which was used, and which formed one of the component elements of the offence of rioting, was criminal force used to public servants[8]. But in a later case it laid down that separate sentences might be passed[9]. Where the common object of the members of an unlawful assembly was to compel Excise officers to abandon the search of certain houses and, after this object was achieved, some of the members proceeded to assault the officers, the Patna High Court held that there could be no doubt that the assault was made in furtherance of the common intention of the assailants, and that they were liable to be convicted under s. 147 and s. 353[10]. Though under s. 146 the use of force or violence is a necessary ingredient of the offence of rioting, yet separate sentences passed on those who actually used force or violence are not illegal[11]. Where an accused person was found with several others to have entered upon another person's land with the common object of cutting crops standing on it, and in prosecution of that object hurt was caused, it was held that the accused could not be convicted and sentenced for criminal trespass under s. 447, in addition to a conviction and sentence for rioting under this section, the common object of the riot and the intention in the

1 *Banga Hadua*, (1909) 11 C. L. J. 270.

2 *Ramasamy Naidu*, (1915) 16 Cr. L. J. 509.

3 *Majhi*, (1927) 9 L. L. J. 369.

4 The offence cannot be compounded under any circumstances. It is *ultra vires* of a Magistrate to allow a non-compoundable offence to be compromised on the grounds that the offence committed might probably in the end turn out to be a compoundable one or that the consequence of his action might probably, in his view, be better for the complainant: *Hira Singh*, (1907) P. R. No. 11 of 1907.

5 *Sheikh Bazu*, (1867) 8 W. R. (Cr). 47; *Durzoolla*, (1868) 9 W. R. (Cr.) 33; *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75; *Hossein Buksh*, (1880) 6 Cal. 96; *Bachu Mullah* v. *Sia Ram Singh*, (1886) 14 Cal. 358; *Chandra Bhuiya*, (1892) 20 Cal. 537; *Nawab*, (1881) P. R. No. 26 of 1881; *Saifulla*, (1882) P. R. No. 15 of 1882; *Nga Shwe Ya*, (1884) S.J.L.B 275; *Nga Shwe Zan*, (1885) S. J. L. B. 331; *Nath Singh*, (1884) O. S. C. 75, 1 O. D. 128.

6 *Ram Adhin*, (1879) 2 All. 139; *Dungar Singh*, (1884) 7 All. 29, dissenting from *Ram Partab*, (1883) 6 All. 121; *Hurgobind*, (1871) 3 N. W. P. 174; *Chhidda*, (1925) 24 A. L. J. 178; *Mohur Mir*, (1889) 16 Cal. 725; *Ram Angutha Singh*, (1913) 40 Cal. 511; *Kapil Mandal* v. *Rabbani Sheikh*, (1925) 41 C. L. J. 471.

7 *Pershad*, (1885) 7 All. 414, F.B.; *Bisheshar*, (1887) 9 All. 645; *Bhagwan Singh*, (1900) P. R. No. 4 of 1901, F.B.; *Bhagwandin Singh*, O. S. C. 125.

8 *Ramdihal*, (1898) 3 C. W. N. 174.

9 *Prokash Chandra Kundu*, (1914) 41 Cal. 836.

10 *Gendo Uraon*, (1927) 6 Pat. 828; *Ramdarsan Mahton*, (1929) 30 Cr. L. J. 634.

11 *Kapil Mandal* v. *Rabbani Sheikh*, *sup.*

criminal trespass being substantially the same in the case[1] Where the common object of an unlawful assembly was to assault the police officers in discharging their duty and hurt was actually caused to some of them, separate sentences under this section and s 332 were disallowed and the sentence under s 332 was only maintained[2] Under the amended s 35, Criminal Procedure Code, separate sentences may be passed subject to s 71 of the Penal Code

No separate sentences should be passed for rioting and theft, when it is not shown that any one of the rioters individually committed theft[3]

As regards punishment see s 71 *supra*

Charge—The common object of the assembly must be stated in the charge in order that the accused person might have an opportunity of meeting it[4] A conviction for rioting based upon a charge which does not specify the common object of the assembly charged with rioting is improper[5] But the omission to set out the common object does not necessarily make the conviction bad It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice[6] It is not a general proposition of law that a conviction under this section cannot be supported whenever the common [illegible] each with [illegible] to and acts the common object in the charge had not been substantially made out and that the conviction under this section was bad[7] In all cases of unlawful assembly the [illegible]

object charged was by means of criminal force to obtain possession of certain lands which comprised two plots one of fifteen *cottahs* and the other of five *cottahs* and it was found by the Court that the offence was committed for obtaining possession of the five *cottahs* plot it was held that the variance between the common object alleged and that found was not such as to invalidate the conviction[9] Where a charge as drawn up by the Magistrate alleges several alternative common objects of the unlawful assembly, it is incumbent on the appellate Court to determine, whether it is sustainable and, if so which of the common object stated has been made out[10] Where the common object of an unlawful assembly is clearly set out in the charge and there is no question in the lower Courts as to the common [illegible]

1 *Bhup Sing* (1903) 8 C W N 305
2 *Gowardhan Das* (1907) P W R (Cr) No 38 of 1907
3 *Mithoo Singh* v *Gopal Lal*, (1899) 3 C W N 761
4 *Sahir* (1899) 22 Cal 276 *Behari Mahton*, (1884) 11 Cal 106
5 *Chunder Coomar Sen* (1899) 3 C W N 605 *Poresh Nath Sircar* (1905) 33 Cal 295, *Panchanan Bose* (1919) 30 C L J 19
6 *Budhu* v *Mussti Lachmina* (1905) 9 C W N 599 *Gowardhan Das* (1907) I W [illegible]

charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case, it was held that the omission had prejudiced the accused and was not cured by s. 537, cl. (*a*), of the Code of Criminal Procedure[1]. Where the common object of an unlawful assembly was stated in the charge to have been to cause obstruction to measurement and demarcation of Khas Mahal land, it was held that if it was not established that the land was in the actual possession of the Government, the charge as laid was not proved[2].

In a trial for a charge under this section, it is not illegal to frame charges under ss. 324 and 325 against particular accused persons, although these offences were committed by them outside the scope of the common object mentioned in the charge under this section, if all the acts with which the accused are charged form one transaction[3].

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, it is sufficient to state in the charge that the common object was "to assault" the persons to whom hurt was caused[4].

The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, viz., in——, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Rioting, armed with deadly weapon.

148. Whoever is guilty of rioting, being armed[1] with a deadly weapon[2] or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravated form of the offence under the last section. Enhanced punishment is provided if a person is armed with a deadly weapon. This section bears the same relation to s. 147 just as s. 144 does to s. 143.

1. **'Being armed'.**—If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual persons so armed who can be charged under it[5]. The Madras High Court has held that a person who is a member of an unlawful assembly can be guilty under this section, when he himself is not armed with a deadly weapon, but some other member of the assembly is so armed. The Court observed: "Where an assembly is an unlawful assembly, S. 149 makes every one of the members of the assembly guilty of any offence which is committed in prosecution of the common object of the assembly. If a deadly weapon is carried without the knowledge of the other members of the assembly for the private ends of a particular individual, no doubt the other persons would not be guilty under

1 *Poresh Nath Sircar*, (1905) 33 Cal. 295.
2 *Panchanan Bose*, (1919) 30 C. L. J. 19.
3 *Rasul*, (1928) 29 Cr. L. J. 801.
4 *Chhanka Dhanuk*, (1927) 6 Pat. 832.
5 *Sabir*, (1894) 22 Cal. 276; *Ram Saran Rai*, (1899) 19 A. W. N. 77; *Bhunjun Pauray*, (1865) 4 W. R. (Cr.) 8; *Choitano Rauto*, (1915) 16 Cr. L. J. 446. See, however, *Srihari Shome v. Lal Khan*, (1900) 5 C. W. N. 250, as regards s. 144.

S 148 But where the fact is not made out but it is shown that one or more of the members of the assembly carried a deadly weapon it cannot be said that the weapon was not carried in prosecution of the common object and therefore all the members of the assembly are guilty under S 148 [1]

2 **'Deadly weapon** —Such as fire arms swords etc The question whether or not a club (*lathi*) is a deadly weapon is a question of fact to be determined on the special circumstances of each case[2] A *lathi* in itself is not a deadly weapon unless and until it is used on the head or on some vital part of a person[3] Stout male bamboos have been held to be deadly weapons[4]

PRACTICE

Evidence —Prove points (1) to (5) as in s 147 and further

(6) That the accused was armed with a deadly weapon or with something which was likely to cause death when used as a deadly weapon

A charge under this section read with s 149 is incongruous and improper A person can be convicted under this section only where there is a finding that the particular accused was present in the mob armed with a deadly weapon[5]

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Court of Session Presidency Magistrate or Magistrate of the first class

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at—— were a member of an [illegible] assembly [illegible] something [illegible] nd thereby committed an offence punishable under s 148 of the Indian Penal Code and within may cognizance[6]

And I hereby direct that you be tried on the said charge

Every member of unlawful assembly guilty of offence committed in prosecution of common object

149 If an offence is committed by any member of an unlawful assembly[1] in prosecution of the common object of that assembly[2], or such as the members of that assembly knew to be likely to be committed[3] in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence

COMMENT.

Principle —This section creates no offence but like s 34 is merely declaratory of a principle of the common law, which at any rate in England has [illegible]

[1] *Mudurupayalagadu* (1926) 50 M. L. J 559 27 Cr L J 894

[2] *Nathu* (1892) 15 All 19

[3] *Parma Singh* (1911) 12 Cr L. J 103

[4] *Krishna Chetti* (1882) 1 Weir 70

[5] *Jiwan Raut*, (1922) 4 P L T 502

[6] (1865) 4 W R (Cr L.) 9 and 10 (1867) 8 W R (Cr L) 17

[7] *Bisheshar* (1887) 9 All 645 *Theethumalai Gounder* (1924) 47 Mad 746 F B., *Chhidda* (1925) 27 Cr L. J 287

or the other members, in prosecution of the common object of such assembly, or one which he must have known was reasonably likely to be committed in the prosecution of such common object. In other words, this provision, so to speak, takes him out of the region of abetment, and makes him responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly"[1]. If it is not possible to bring home the guilt to the accused under s. 325 read with this section then *a fortiori* it would be more difficult to bring home the guilt with the aid of s. 34[2].

A person cannot be tried and sentenced under this section alone. There must be some substantive offence charged to be read with this section[3].

Section 34 and s. 149.—Section 34 and this section deal with liability for constructive criminality, i.e., liability for an offence not committed by the person charged.

"Sect. 149...creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object—namely, one of those named in s. 141: *Reg.* v. *Sabid Ali*[4]—and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of *participation in action*, which is the leading feature of s. 34, is replaced in s. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but s. 149 cannot at any rate relegate s. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all"[5]. Section 34 refers to cases in which several persons both do an act and intend to do that act; it does not refer to cases where several persons intend to do an act and someone or more of them do an entirely different act. In the latter class of cases s. 149 may be applicable but s. 34 is not[6].

Scope.—This section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common objects. It is divided into two parts: (1) an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly; and (2) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object. In order to bring a case within the first part the act must be one which, upon the evidence, appears to have been done with a view to accomplish the common object. "At first, there does not seem to be much distinction between the two parts of the Section, and...the cases which would be within the first offences committed in prosecution of the common object, would be, generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But... there may be cases which would come within the second part, and not within the first...Persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking, or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause,

1 Per Straight, J., in *Ram Partab*, (1883) 6 All. 121, 123.
2 *Bhabataran Mahto*, (1925) 7 P. L. T. 390.
3 *Theethumalai Gounder*, (1924) 47 Mad. 746, ... (1924) 3 Pat. 870.
4 (1873) 20 W. R. (Cr.) 5, 11 Beng. L. R. 347, 349, F.B.
5 *Barendra Kumar Ghosh*, (1924) 52 I. A. 40, 52, 52 Cal. 197, 27 Bom. L. R. 148.
6 *Aniruddha Mana*, (1924) 26 Cr. L. J. 827.

removed railway rails, sleepers, etc., and there was no evidence that the accused themselves took any active part in any act specified by s. 126 of the Indian Railways Act, it was held that the accused could not be held constructively guilty of an offence under the Railways Act[1].

2. 'In prosecution of the common object of that assembly'.—These words must be confined to something *immediately* connected with the common object[2]. The test whether an offence is committed in prosecution of the common object is whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. No offence, however, executes or tends to execute the common object, unless the commission of that offence is involved in the common object. When this is not the case, the offence committed not being committed in prosecution of the common object, in its strict sense, may yet fall under the second branch[3]. The existence of a common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused[4]. See ss. 34 and 111, *supra*.

The expression 'common object' is not used in the same sense as 'the common intention' in s. 34, which means the intention of all whatever it may have been. The expression refers to one of the five objects mentioned in s. 141. The object of an assembly as a whole may not be the same as the intention which several persons may have when in pursuance of that intention they perform a criminal act and it may well be that the object of the assembly was lawful whereas the intention common to those of the assembly who jointly committed a criminal act was in itself criminal and the joint criminal act must be equally imputed to all of them[5].

Where the principal offender in a case of rioting is convicted of an offence the others cannot be held to have committed constructively an offence different from the offence found to have been committed by the principal offender. Therefore, where the principal offender was convicted under s. 302, it was held that the others could not be convicted under s. 304 read with this section[6]. This view has been dissented from by the Court of the Judicial Commissioner of Sind which is of opinion that it is not necessary that all the members of an unlawful assembly should either be found guilty of and convicted for an offence of which the principal is convicted or that they should all be acquitted. It is permissible to convict them of a minor offence which is included in the offence for which the principal is convicted[7].

3. 'Or such as the members of that assembly knew to be likely to be committed.—The word 'or' divides the definition into two branches[8]. It is not used in an alternative sense[9]. The expression "such as the members of that assembly knew to be likely to be committed" imports at least an expectation founded upon facts known to all the members of the assembly that an offence of the particular kind committed would be committed: something more than a speculation that such an offence might happen to be committed[10]. The word "knew" indicates a state of mind at the time of the commission of the offence and not the knowledge acquired in the light of subsequent events[11]. The word "knew" is advisedly used, and cannot be made to bear the sense of "might have known"[12].

1 *Aydrooss*, (1922) 17 L. W. 21, [1922] M. W. N. 800; *Vasudeva Mudali*, (1929) 57 M. L. J. 114, 30 L. W. 108.
2 *Ahmed Haji Misri*, (1926) 21 S. L. R. 159.
3 *Madat Khan*, (1887) P. R. No. 61 of 1887; *Rasul*, (1888) P. R. No. 4 of 1889; *Dhian Singh*, (1915) P. W. R. (Cr.) No. 17 of 1915, P. R. No. 16 of 1915.
4 *Golla Hanumappa*, (1911) 35 Mad. 243.
5 *Bhondu Das*, (1928) 30 Cr. L. J. 205.
6 *Ram Prasad Singh*, (1922) 1 Pat. 753.
7 *Ahmed Haji Misri*, (1926) 21 S. L. R. 159.
8 *Madat Khan*, (1887) P. R. No. 61 of 1887.
9 *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 11, 11 Beng. L. R. 347, F.B.
10 *Madat Khan*, sup.
11 *Khamiso*, (1912) 6 S. L. R. 101.
12 *Sabid Ali*, sup., p. 12; *Dial Singh*, (1926) 27 Cr. L. J. 547.

If the offence be such as the members of the assembly knew to be likely to be committed by a person engaged in prosecuting the common object, and acting with the purpose of executing it, it may fairly be imputed to the other members of the assembly

Thus this section does not subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it were proved he knew it to be likely that such offence would be so committed[1]

Culpable homicide —To bring the offence of murder within this section, it must either necessarily flow from the prosecution of the common object or it must so probably flow from the prosecution of the common object that each member [illegible] The offence of murder, as strictly defined [illegible] tion or knowledge in the perpetrator and [illegible] ommitted, is to know that some member of the assembly has such previous intention or knowledge This interpretation of the section, so far as murder is concerned, is confirmed by comparing ss 398 and 396 with s 148 and this section[2] Members of a party setting out heavily armed for the purpose of committing dacoity must know that there is every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their criminal plans and that their deliberate intention is to use their arms wherever necessary, either to effect the object in view or to avoid the risk of capture at any stage of the adventure, and therefore if some of the members of the party fire upon the police killing any one, all are guilty of the offence of murder under this section and s 302[3] Where in a free fight between two parties a person of one party received injuries from the other party, from the result of which he died but the evidence did not disclose who of the participants was the actual person to inflict the injuries which caused the death it was held that it was not a correct view of law that the culpability could not be brought home to all the persons taking part in the fight[4]

In order to sustain a conviction under this section and s 304 it must be shown that there was an unlawful assembly whose common object was to commit an offence under s 304 and that the accused was one of them[5]

Where a prisoner is constructively guilty of murder under s 34 it is doubtful if he can be said to have committed the offence of murder within the meaning of this section, so as to make the other prisoners, by a double construction, guilty of murder[6]

CASES.

Act done in prosecution of the common object —Where persons joined an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encouraged them to do so, they were held to be in the same position as those members of the unlawful assembly who struck the blows[7] Where each of several persons took part in beating a person so as to break eighteen ribs and cause his death, each of them was held to be guilty, as a principal, of the murder of the deceased[8] Where two members of an unlawful assembly used spears and deliberately pierced another man through the chest and abdomen, with the knowledge that death was likely to ensue, although without proof of any intention to cause death, all the members of the unlawful

1 *Sabid Ali*, (1873) 20 W, R (Cr) 5 F B, *Hardeo Singh* (1920) 3 U P L R (P) 29

2 *Ibid*, *Mahmadkhan Sultankhan*, (1907) 9 Bom L R 153, *Imamdin* (1920) 3 L L J 245

3 *Dhian Singh*, (1915) P R No 16 of 1915.

[illegible]

assembly were held guilty of murder[1]. Where a small compact body of men armed with clubs, and headed by a man carrying a gun, endeavoured to take forcible possession of certain lands, and one of the opponents was shot by their leader, it was held that all of them were guilty of murder[2]. The accused's cattle were doing considerable damage to the crops belonging to complainants who drove them to the cattle-pond. While they were on the way to the pond the accused came armed with clubs, to rescue the cattle. At the command given by one of them, the others assaulted the deceased and beat him with the result that he died. It was held that the offence was committed in pursuance of the common object and each one of the accused was guilty of an offence under s. 302[3]. Where a number of persons set out to abduct women and two of them were armed with pistols and a person was shot in the prosecution of the common object, the Court held that the obvious inference to be drawn was that the pistols were intended to be used, if necessary, to overcome any resistance that might be offered and the members of the gang knew that murder was very likely to be committed, and that the accused was constructively guilty of murder though he was not the murderer[4].

A person retiring from a fight has no further common object with those who continue it.—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. It was held that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under this section, be made liable for the subsequent murder[5].

Persons having no common object to do a particular offence are not liable for commission of it by others.—Where six persons at first united in abusing another and afterwards one of the six ordered him to be seized,—three others executed the order, and in doing so killed the person abused,—it was held that the remaining two accused were not liable to punishment, as the party had no illegal object in common until the deceased was ordered to be seized, and the evidence went to show that they took no part in it, but were merely unarmed spectators[6]. Similarly, where a number of persons went together to eject a man from a plot of land, the title of which was in dispute, and upon a vigorous resistance being made, one of the party who was armed with a gun, fired at, and killed, the resisting person, it was held that he was guilty of murder, but that the other members of the unlawful assembly were not guilty of murder under this section as the act of killing was not the common object of the assembly, or "likely to be committed in the prosecution of that object"[7]. A murder was committed by one of a number of persons concerned in an unlawful assembly, one or two of them being armed with weapons of a deadly nature. It was held that the accused who actually took life was guilty of murder, but that the others were guilty of the minor offence of rioting. The question whether the other persons were guilty of murder depended upon the consideration whether such persons knew that a deadly weapon was likely to be used with a fatal result in the prosecution of their common object; and that though it might be presumed in the case of a number of persons armed with deadly weapons going out to commit an act of violence, that they knew that those weapons might be used with a fatal result, the presumption was still one of

1 *Nazoo Fakir*, (1865) 4 W. R. (Cr.) 26.

2 *Hari Singh*, (1878) 3 C. L. R. 49; *Golam Arfin*, (1870) 4 Beng. L. R. App. 47, 13 W. R. (Cr.) 33.

3 *Rasul Khan*, (1915) 13 A. L. J. 470.

4 *Mansha Singh*, (1924) 7 L. L. J. 51; *Bashir*, (1927) 4 O. W. N. 313.

5 *Kabil Cazee*, (1869) 3 Beng. L. R. (A. Cr. J.) 1: *Raghunandan*, (1912) 15 O. C. 183.

6 *Foiz Ali*, (1864) 1 W. R. (Cr.) 20; *Sheoraji Singh*, (1926) 24 A. L. J. 394.

7 *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 11 Beng. L. R. 347, F.B. See *Chundersungjee*, (1869) Unrep. Cr. C. 14; *Nihal Singh*, (1927) 28 P. L. R. 674.

fact and must be reasonable in the particular circumstances of the case[1] A gang of persons making preparations to commit dacoity was discovered in the limits of a certain village and was pursued by villagers who seized and arrested two accused who were members of the gang Shortly afterwards a dacoit at large fired a gun and killed one of the villagers It was held that the two accused were not guilty of murder as there could be no common object between them and the other after they separated[2] M and his party were ploughing certain disputed land when the members of the complainant s party came up to interfere with them and to turn them out The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of M s party and that on the other hand M was not justified in striking B (one of the complainant s party) on the head and thereby causing his death It was held that as the members of the deceased s party were the aggressors their object having been to dispossess the other party from the land M s party were pe fectly [illegible] in exerc sing the r right of private defence and if M exceed [illegible] and this section did not c [illegible] as they were not at the [illegible]

Where, after the object of an unlawful assembly was accomplished and the opposite party driven away one of the members entered into an altercation with another and wounded him with a fish spear it was held that he alone was responsible for the offence[4]

Where a riotous mob started pelting stones etc with the intention of wreak[illegible] a Dramatic Troupe for his refusal to give away [illegible] and Khilafat funds but when the police startec [illegible] into one of vengeance on the Deputy Superintendent consequent on one of the mob having been shot dead it was held that persons who were present in the mob only at the first attack could not be held guilty of offences committed in the second attack and conversely those present only at the second attack could not be held guilty of the offences committed in the first attack[5]

PRACTICE

Evidence —Prove (1) that there was an unlawful assembly

(2) That the accused was a member of that unlawful assembly (s 142)

(3) That he had intentionally joined or continued in such unlawful assembly

(4) That an offence was committed by a member of such assembly

(5) That such offence was committed (*a*) in prosecution of the common object of such assembly or (*b*) such as the members of the assembly knew to be likely to be committed in prosecution of the common object etc

It is essential to prove that the person sought to be charged with an offence by the aid of this section was a member of the unlawful assembly at the time the offence was committed and the burden of proof lies on the prosecution More over before an offence under any other section can be imputed under this section to all the persons who were members of an unlawful assembly at the time of its commission it is necessary to show, among other things that the offence sought to be imputed has been committed by a member of the assembly either known or unknown[6]

Procedure —Same as that for the offence committed Not compoundable

1 *Rana Muppan* (1879) 3 Mad Jur 416 See *Ram Khelawan Singh* (1909) 13 C W N 827

2 *Hari Bajal* (1915) 17 Bom L R 906, 3 Bom Cr C 118

3 *Mohan Singh* (1914) P R No 26 of 1914

4 *Binod* (1875) 24 W R (Cr) 66

5 *Ganapathi Sarma* (19??) 17 L W 10?

6 *Rasul* (1888) P R No 4 of 1889

The Calcutta High Court has held that where a person is charged by implication under this section, he cannot be convicted of the substantive offence[1]. The Madras High Court has dissented from this view and has laid down that when a charge has been framed under s. 326 and this section a conviction under s. 326 alone is not necessarily bad and that the legality of the conviction depends upon the question whether the accused was materially prejudiced by any omission in the charge[2]. The same is the view of the Patna High Court[3]. Where the accused have been acquitted of rioting they cannot be convicted of grievous hurt under s. 325 by the application of this section, where it has not been found that they or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object[4].

Charge.—An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him, where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company[5]. It is obligatory to set out the common object in the charge, otherwise the conviction would be vitiated[6]. Where there is no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt for the purpose of committing theft, no conviction for dacoity by force of s. 34 or this section can be sustained[7]. The former Chief Court of the Punjab ruled that it was not always necessary that the common object should be set out in the charge, but it was desirable to do so where the nature of the case allowed or required it. *In any case such an omission was not a fatal defect and was curable under s. 537* of the Code of Criminal Procedure[8]. The omission of this section from a charge does not create an illegality by reason of s. 233, Criminal Procedure Code. It is only an irregularity coming under s. 537 of the Code of Criminal Procedure[9]. An accused person can be convicted under this section of a substantive offence even though no reference is made in the charge to this section. Where the accused were originally charged with and convicted for offences under ss. 147 and 353, Penal Code, but on appeal convictions under s. 323 read with s. 149, and s. 353 read with s. 149 were substituted for the original convictions, it was held that s. 149 did not create a definite offence and that, therefore, omission to mention the section in the charge did not vitiate the convictions[10].

Where in a charge this section was mentioned instead of s. 34, it was held that the accused was not prejudiced because this section was wide enough to cover the principle of s. 34[11].

The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and in prosecution of the common object of which, viz., in—— one of the members——, caused (*specify the offence*) to——, and you are thereby, under s. 149 of the Indian Penal Code, guilty of causing the said (*offence*) an offence punishable under s.——of the Indian Penal Code, and within my cognizance (*or within the cognizance of the Court of Session*).[12]

1 *Reazuddi*, (1912) 16 C. W. N. 1077; *Baij Nath*, (1924) 1 O. W. N. 588.

2 *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.

3 *Ritlal Singh*, (1923) 5 P. L.T. 198.

4 *Abhi Misser* v. *Lachmi Narain*, (1900) 27 Cal. 566.

5 *Behari Mahton*, (1884) 11 Cal. 106.

6 *Kudrutulla*, (1912) 39 Cal. 781.

7 *Kolloora Thevan*, (1923) 46 M. L. J. 311.

8 *Dhian Singh*, (1915) P. W. R. (Cr.) No. 17 of 1915.

9 *Theethumalai Gounder*, sup.

10 *Ramasray Ahir*, (1928) 7 Pat. 484.

11 *Pira*, (1925) 8 L. L. J. 198, 27 P. L. R. 347.

12 (1866) 5 W. R. (Cr. L.) 1.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Punishment —Separate sentences may be passed under s 147 and any other section which becomes applicable to the accused with reference to the terms of this section[1] See s 71, *sup*

Hiring or conniving at hiring of persons to join unlawful assembly

150 Whoever hires or engages, or employs or promotes[1], or connives[2] at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly[3], shall be punishable as a member of such unlawful assembly, and for any offence[4] which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

COMMENT.

Object —The object of this section is to bring within the reach of the law those who are really the originators and instigators of offences committed by hired persons The ordinary law of abetment might be sufficient to punish those who, by hiring or engaging others, instigate them to join an unlawful assembly [illegible] of hiring although known to [illegible] will probably succeed in evading [illegible] efore extend not only to acts of instigation by the master, but to acts of instigation when done by others (his agents) and knowingly permitted, or connived at, by him

1 **'Promotes'** —This word indicates cases of active assistance in hiring

2 **'Connives'.**—That is passively allows

3 **'Any unlawful assembly'.**—This section refers to a particular unlawful assembly Where, therefore, it is found that any person has hired or engaged any other person or persons to join or become members of a particular unlawful assembly, he is liable for any offence committed by any member of that unlawful assembly in the same way as if he had been a member of that unlawful assembly or himself had committed such offence Where a Magistrate only found that what the accused has been doing is collecting and harbouring men for the purpose of committing a riot should he find it in his interest to do so , and there was no finding that there had been any unlawful assembly, composed of persons said to have been hired by the accused and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly, not that an unlawful assembly made up of the elements provided for by s 141 was in the contemplation of the accused, it was held that the accused could not be convicted of having committed an offence under this section or s 157[2]

4 **'Offence'.**—See s 40, *supra*

PRACTICE

Evidence —Prove (1) that the accused hired or engaged, etc the person in question, or that he promoted, or connived at, such hiring, etc In the case of connivance it should also be proved (*a*) that the accused was legally bound to

1 *Sheo Nath* (1926) 3 O W N 92 2 *Ram Lochan* [illegible]

prevent the hiring; (*b*) that he was physically able to prevent it; and (*c*) that he did not prevent it, or do all that lay in his power towards preventing it.

(2) That such hiring, etc., was to join, or to become member of an unlawful assembly.

Procedure.—Cognizable—Not compoundable. See the offence committed.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, hired (*or* engaged, *or* employed [*or* promoted (*or* connived at the hiring *or* engagement, *or* employment)] of one AB *to* join as (*or* become) a member of an unlawful assembly, and that the said AB as a member of such unlawful assembly in pursuance of such hiring (*or* engagement *or* employment) committed (*specify the offence and the person*), and that you have thereby committed an offence punishable under ss. 150 and——of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to diperse.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse[1], shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

COMMENT.

The offence under this section consists in the disobedience to the mandate of the law, which has ordered the assembly to disperse. Section 145 provides for the punishment of a person who joins or continues in an unlawful assembly knowing it has been commanded to disperse. The 'assembly' under this section need not be an 'unlawful assembly'. It must only be an assembly likely to cause a disturbance of the public peace.

1. **'After such assembly has been lawfully commanded to disperse'.**—Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse: and it shall thereupon be the duty of the members of such assembly to disperse accordingly[1]. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act (XX of 1869), and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law[2]. If any such assembly cannot

[1] Criminal Procedure Code, s. 127. [2] *Ibid*, s. 128.

be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force[1]

The expression "lawfully commanded to disperse" means in the City of Bombay, commanded as prescribed in s 40 of the City of Bombay Police Act, 1902[2].

CASES.

Refusal to disperse—Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, it

the members liable to punishment[3]

A procession of Hindus some of them carrying and using various musical instruments, was about to pass in front of a mosque, with the probable consequence in the circumstances that a serious riot would have resulted when they were confronted by a Sub-Inspector of Police, who ordered the leaders of the procession to stop the music and that the crowd should disperse The leaders of the procession did not obey the order of the Sub Inspector, but on the contrary advanced a short distance playing on a drum Subsequently, however on a show of force being made by the police the procession laid down their musical instruments and dispersed It was held that the two leaders of the procession were guilty under this section[4]

PRACTICE.

Evidence—Prove (1) that the assembly was composed of five or more persons

(2) That such asse

It is not sufficient

in the opinion of the Mag

a disturbance it is necessary to establish to the satisfaction of the Court that the assembly was in fact likely to cause it[5] The opinion of the police officer dispersing it is admissible[6]

(3) That such assembly had been commanded to disperse

(4) That such command was lawful

(5) That the accused joined or continued in, such assembly after it had been so commanded to disperse

(6) That the accused did so knowingly

Procedure—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily

Charge—I (*name and office of Magistrate, etc*), hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, joined (*or* continued in) an assembly of five or more persons likely to cause a disturbance of the public peace, after knowing that such assembly had been lawfully commanded to disperse and thereby committed an offence punishable under s 151 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

[1] Criminal Procedure Code s 129
[2] *Keshav Govind*, (1921) 23 Bom L R 350
6 Bom Cr C 47
[3] *Tucker*, (1882) 7 Bom 42
[4] *Raghunath Venaik Dhulekar*, (1924) 47 All 205
[5] *Murlidhar*, (1887) P R No 22 of 1887
Girdhara Singh, (1921) 3 L. L. J 529
[6] *Tucker*, sup.

152. Whoever assaults[1] or threatens to assault, or obstructs or attempts to obstruct, any public servant[2] in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly[3] or to suppress a riot[4] or affray[5], or uses, or threatens, or attempts to use criminal force[6] to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

Assaulting or obstructing public servant when suppressing riot, etc.

COMMENT.

The last section punished disobedience to the order of a public servant commanding an assembly to disperse: this section punishes more severely persons who assault a public servant endeavouring to disperse an unlawful assembly. This section is intended to prevent the use of force on a public servant in order to prevent him from discharging his duty.

1. **'Assault'**.—See s. 351, *infra*.
2. **'Public servant'**.—See s. 21, *supra*.
3. **'Unlawful assembly'**.—See s. 141, *supra*.
4. **'Riot'**.—See s. 146, *supra*.
5. **'Affray'**.—See s. 159, *infra*.
6. **'Criminal force'**.—See s. 350, *infra*.

PRACTICE.

Evidence.—Prove (1) that an unlawful assembly was held.

(2) That an endeavour was being made to disperse it.

(3) That the person endeavouring so to disperse it was a public servant.

(4) That such public servant was then acting in the discharge of his duty as such public servant.

(5) That the accused assaulted, or threatened to assault, or obstructed or threatened to obstruct such public servant, whilst so discharging his duties, or that he used, or threatened to use, or attempted to use, criminal force to such public servant, whilst so discharging his duties.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—This section contemplates an assault or obstruction to some particular public servant. Where, therefore, the charge against the accused as framed was merely to the effect that they assaulted and obstructed members of the police force in the discharge of their duties, etc., the conviction under this section was not upheld[1].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted (*or* threatened to assault, *or* used, *or* threatened to use, criminal force to)——, a public servant, in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (*or* to suppress a riot *or* affray) and thereby committed an offence punishable under s. 152 of the Indian Penal Code and within my cognizance (*or* cognizance of the Court of Session).

[1] *Ferasat*, (1891) 19 Cal. 105.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

153 Whoever malignantly[1], or wantonly[2], by doing any thing which is illegal[3], gives provocation to any person intending or knowing it to be likely that such provocation[4] will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both, and, if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months or with fine, or with both.

Wantonly giving provocation with intent to cause riot—

if rioting be committed

if not committed

COMMENT

This section punishes a person who does acts which provoke others to commit rioting but which do not amount to abetment It is divided into two parts If rioting is committed the punishment is more severe

1. **'Malignantly'** implies a sort of general *malice*[1] According to Webster the adverbs 'maliciously and 'malignantly' are synonymous *Malice* is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means an unlawful act done intentionally without just cause or excuse[2] *Malignant* means extreme malevolence or enmity, violently hostile or harmful A riot took place between Hindus and Mussalmans The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely, the Ghatis and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters The poem extolled the Ghatis and Kamatis and then followed these lines —

"May God give glory to you, confer joy on you night and day
Fight again for your country's good "

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatis and Kamatis or even by the Mahomedans It did not appear that any copies of the work were distributed among the people who had taken part in the riot Nor did any fresh riot take place subsequently to the publication of the work The accused were prosecuted and convicted under s 117 and this section, on the ground that the lines quoted above, especially the words "Fight again," were a direct instigation to the Ghatis and Kamatis to renew the disturbances It was held that the meaning of the passage complained of was to be gathered from the whole poem The general spirit of the poem was clearly in favour of peace and reconciliation It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances The words "Fight again' were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work[3]

1 *Kahanji* (1893) 18 Bom 758 775, *Husain Bakhsh*, (1907) 29 All 569, 571

2 *Bromage* v *Prosser*, (1825) 4 B & C 247

3 *Kahanji*, (1893) 18 Bom

2. **'Wantonly'** means recklessly[1], thoughtlessly, without regard for right or consequences. This word gives to the offence contained in this section a far larger, vaguer, and more comprehensive scope, than would be implied by the word 'malignantly' standing alone. It occurs in this section, while the word 'malignantly' occurs once again in s. 270.

Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it was held that the persons concerned acted 'wantonly' within the meaning of this section[2]. Similarly, where certain Mahomedans formed themselves into a procession and proceeded along a certain route and disobeyed the orders of the police and came into contact with a procession of Hindus,and a riot resulted, it was held that they were guilty of an offence under this section as they refused to comply with the orders of the police[3].

3. **'Illegal'.**—An offence under this section requires that the offender should do something illegal by doing which he malignantly or wantonly gives provocation to any person intending or knowing it to be likely that a riot would be the result[4]. As to the meaning of 'illegal', see s. 43, *supra.* A Mussalman procession passed by the door-way of the accused, outside which he had, without any permission, erected a screen and inside which was an image of the goddess Bhawani. The accused was asked to close the door or to put up a screen for a few minutes while the procession passed by, and he refused to do so. The Magistrate convicted the accused on the ground that "by this illegal omission of respect to the religious feelings of the Mussalmans, he provoked a riot". It was held that the conviction was wrong[5]. Where a priest leaves the temple at midnight leaving it in charge of a third person and then deliberately throws bricks at the temple hoping that the Hindus, believing that the bricks came from the Mahomedans' quarter, would be enraged against the Mahomedans and there would be a riot between the Hindus and the Mahomedans but nobody is hurt, the priest could not be convicted under s. 334, his act being neither rash nor negligent but deliberate, nor under this section as it cannot be said that his act was illegal, the throwing of a brick at a temple not being prohibited by law[6].

4. **'Gives provocation to any person, etc.'**—The provocation should have been given with the intention or knowledge that it is likely to cause rioting. Where a Mahomedan killed a cow not in the presence of any Hindu, but the Hindus came to know of it subsequently, it was held that no offence was committed under this section although the religious feelings of the Hindus were hurt on hearing of it. The act of killing the cow not having been done in the presence of any Hindu whose feelings would be wounded it would not amount to 'giving provocation' if on subsequently hearing of the act the religious feelings of certain Hindus were hurt[7]. Where the natural and probable effect of reading a pamphlet was to give provocation to the followers of the Head Priest of the Dawoodi Bohra community, it was held that the writer of the pamphlet might properly be said to have intended that such provocation would cause rioting and that he was therefore guilty of an offence under this section[8].

PRACTICE.

Evidence.—(1) That the accused did an act which was illegal.

(2) That he did so malignantly or wantonly.

1 *Husain Bakhsh,* (1907) 29 All. 569.
2 *Ibid.*
3 *Gulam Kader Saheb,* (1927) 30 Bom. L. R. 367, 9 Bom. Cr. C. 248.
4 *Khushal Singh,* (1886) 6 A. W. N. 23.
5 *Ibid.*
6 *Gaya Prasad,* [1929] A. L. J. 175.
7 *Abdullah,* (1919) 17 A. L.J. 200, 1 U. P. L. R. 85.
8 *Rahimatalli Mahomedalli Mulla,* (1919) 22 Bom. L. R. 166, 5 Bom. Cr. C. 175.

knew that
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also whether riot was or was not committed in consequence of such provocation

If the riot was not committed the accused would be liable under the first clause if it was then the offence would be punished under the second clause

Procedure —Cognizable—Warrant (if riot be committed) otherwise summons—Bailable—Not compoundable—Any Magistrate—Triable summarily if riot not committed

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at—— malignantly (*or* wantonly) by doing——which was illegal gave provocation to—— intending (*or* knowing it to be likely) that such provocation would cause the offence of rioting to be committed and thereby committed an offence punishable under s 153 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

Promoting enmity between classes

153A Whoever by words either spoken or written or by signs or by visible representations or otherwise promotes[1] or attempts to promote feelings of enmity or hatred between different classes[2] of Her Majesty s subjects shall be punished with imprisonment which may extend to two years or with fine, or with both

Explanation —It does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of Her Majesty s subjects

COMMENT

This section was added by Act IV of 1898 s 5 It is extremely wide though controlled by the explanation It supplements the law of sedition enacted in s 124A

When the bill to amend s 124A was introduced the Legislature thought of putting the words promotes or attempts to promote feelings of enmity or ill will between different classes of Her Majesty s subjects as a clause in the proposed s 124A But the Select Committee omitted this clause and introduced the present section on the following grounds It appears to us that the offence of stirring up class hatred differs in many important respects from the offence of sedition against the State It comes more appropriately in the Chapter relating to offences against the public tranquillity The offence only affects the Government or the State indirectly and the essence of the offence is that it predisposes classes of the people to action which may disturb the public tranquillity The fact that this offence is punishable in England as seditious libel is probably due to historical causes and has nothing to do with logical arrangement [2]

Principle —The section means that no subject of the Crown is entitled to write or say or do anything whereby the feelings of one class of His Majesty s subjects will be inflamed against another class of his subjects[3]

1 *Kahany* (1893) 18 Bom 58
2 See G I 1898 Part V p 13
3 *B I G ngadlar T lal* (1908) 10 Bom L R 848

Scope.—It is unnecessary, under this section, as in s. 124A, to establish the success of an attempt. A man cannot escape from the consequences of uttering words, with intent to promote feelings mentioned in the section, solely because the persons to whom they are addressed may be too wise or too temperate to be influenced by them.

In a much criticised Lahore case (known as the *Rangila Rasul* case) Dalip Singh, J., held that this section was intended to prevent persons from making attacks on a particular community and was not meant to stop polemics against deceased religious leaders (like Prophet Mahomed) however scurrilous and in bad taste such attacks might be[1]. This view was not approved of in a subsequent case (known as *Risala-i-Vartman* case) tried before a special Bench of the Lahore Court, though there is no reference to the former case in the judgment. In the latter case also the article was a disguising satire on certain incidents in the life of Prophet Mahomed and was in extremely bad taste and scurrilous in nature[2].

Intention.—The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The Court must be satisfied that the accused had a conscious intention of promoting, causing or exciting, enmity and hatred between various classes, e.g., Europeans and Indians[3]. There must be a deliberate attempt to incite one class against another[4]. The essence of the offence is malicious intention. If there is no malicious intention in the publication, honesty of purpose may be inferred[5]. It is necessary for the prosecution to prove that the accused had the intention, in acting as he did, to promote enmity between the Hindus and Moslem communities. His intention may be gathered from the words themselves or may be proved by evidence dehors those words. Equally, it is not incumbent on the prosecution to prove that his attempt to promote discord was successful provided he had the intent. Nor is it a good lefence that the accused's action was prompted by a desire to protect himself and is community from violence although that is an element which may be taken into onsideration in assessing his punishment[6].

The intention of the writer must be gathered from the article as a whole, d a person cannot, therefore, be convicted under this section where the article es not show any such intention as is referred to in the section even though isolated rtions of the article may, taken by themselves, fall within the section. A ter cannot be convicted of an offence under this section where it is possible that may have, without any malicious intention and honestly, though wrongly in the ion of the Court, thought that he should express himself in the manner in which id with a view to the removal of causes which according to him were promoting d a tendency to promote feelings of enmity or hatred between different classes is Majesty's subjects[7].

The intention can be inferred from the effect, the words, signs or other rentations are likely to produce upon the class of persons to be affected by it. ion can be deduced from the internal evidence of the words used by the

It is permissible to examine the general policy of the paper in which the in question has appeared and also to take into consideration the persons for t was written and the state of feelings of the communities, between whom ended to promote feelings of enmity or hatred, at the time of the publication[8].

Paul, (1927) 28 P. L. R. 497.

Sharan Sharma, (1927) 28 P. L. R.

nt Rai, (1907) P. R. No. 10 of 1907.

is essential: per Woodroffe, J., *rita Bazar Patrika*, (1919) 30 C.

ndra Sarkar, (1910) 38 Cal. 214.

ra Prasad Ghose, (1926) 45 C. L. J. 432, 31 C. W. N. 168.

6 *Manantrai Raiji*, (1929) Criminal Revision No. 86 of 1929, decided by Kemp and Baker, JJ., on May 17, 1929 (Unrep.)

7 *Iswari Prashad Sharma*, (1927) 46 C. L. J. 154.

8 *Devi Sharan Sharma*, (1927) 28 P. L. R. 514.

If the language of a writing is of a nature calculated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to produce[1]

1 '**Promotes** — The word promote in Websters Dictionary is said to mean (1) to contribute to the growth enlargement or prosperity of any process or thing that is in course to forward to further to encourage to advance to excite and also to urge on or incite another as to strife A man may promote a thing without intending to do so as a matter of fact it often happens that a man intending to promote one thing actually promotes the opposite *ex gr* measures intended to prevent drunkenness often increase it Free trade intended to promote the prosperity of the country may injure the country It would therefore appear that apart from intention not being mentioned in the section it forms no essential part of the meaning of the word promotion

However from the conjunction of the words attempt to promote with promote I am disposed to think that it was intended by the framer of the section that intention should be an element in the offence It is not essential to the meaning of promotion that the object arrived at should be effected That I take to be one of the differences between promoting and causing Cause implies effect Promotion does not The promotion may fail of its object in this respect it may be a synonym for foment It is also not essential that promotion should be with reference to something already in existence It would be possible to promote hatred where amity had previously existed

It is also obvious that enmity may be promoted as strongly or more strongly by stories that are true than by stories that are false [2]

This section does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under it The words promotes or attempts to promote feelings of enmity are to be read as [illegible]

tendency is not sufficient Whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves but other evidence can also be looked at They are decisive in all cases where the intention is expressly declared also if the words used naturally clearly and indubitably have such a tendency then it must be presumed that the publisher intended that which is the natural result of the words used But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test There is no such doctrine as constructive intention [3]

2 '**Classes** —The word classes includes races e g Europeans and Indians[4] An attack upon a school of opinion does not necessarily involve an imputation upon the class who hold or give effect to that opinion But one is apt to lead to the other[5] The word classes includes religious denominations[6]

Attack on the policy of the Government is not necessarily an attack on the British people[7]

Explanation—The explanation does not enlarge the provisions of the substantive section In this explanation we have what the Judicial Committee

1 *Kali Charan Sharma* (19?7) ?9 Cr L. J 968

2 Per Clark C J in *Jaswant Rai* (1907) P R No 10 of 1907 at p 35

3 *Chakravarti* (19?6) 54 Cal 59 64 6? Followed in *Devi Sharan Sharma* (192) 28 P L. R. 497

4 *Jaswant Rai*, sup p 43.

5 *Besant* v *Advocate General of Madras* (1919) 21 Bom L. R. 867 P C.

6 *Raj Paul*, (1927) 28 P L R 497

7 *Nabi Bux* (1923) 17 S. L R

has called "a delicate balancing of two important political considerations" and further that in applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony[1].

It requires honesty and absence of malicious intention. A person who published as true a detailed account of a brutal murder of an Indian by a European based in fact on a mere rumour which had died out years before the publication and to the revival of which he himself had largely contributed, was held to be not protected from criminal liability by the explanation[2].

Where the writer of an article inveighed both against the Babus and Meahs. as professing brotherhood with the poor Mahomedan ryots and then robbing them, and referred to the alleged conduct of Christian Missionaries towards their converts, by way of illustration, without any deliberate attempt to excite one class against another, the conviction under this section was set aside as bad in law[3].

Where the editor of a newspaper reproduces, in the ordinary way as news, the contents of an inflammatory leaflet, inciting members of one community to violence against the members of another community, without intent to utilise the same to promote or further class hatred, but in circumstances which show a genuine intention to reprehend it and get it traced to its source and stopped, this section does not apply, although some readers of the paper may be thereby induced to entertain unreasonable feelings against the members of another class or community. Such a publication, where the intention was to bring it to the notice of the proper authorities, is covered by the explanation to the section[4].

Where the writer of an article complained in a sober language, free from exaggerations and incisive comments, had for the consideration of public officers and others concerned with a view to their taking necessary action to prevent a repetition of what had previously taken place and the article contained no such statement, expression, or comment, as might fall within the purview of s. 505 or this section, it was held that he could not be convicted of an offence under this section[5].

Where a drama was written at a time of great public excitement and the writer without any malicious intention and honestly thought that he should express himself in the manner in which he did with a view to the removal of causes which according to him were promoting or tending to promote feelings of enmity or hatred between Hindus and Mahomedans, it was held that as the writer was quite honest in the view which he took, though it might be a wrong one, he could not be held guilty under this section[6].

An article purported to be a dream in which the writer (a Hindu) was borne to Heaven where he was given a mysterious animal to ride and on its back he visited Paradise and Hell. In the latter place he professed to have seen Prophet Mahomed surrounded by a large number of other historical Muslims and held certain conversations with them. The prophet was depicted as being in Hell suffering extreme torture; around him were his wives and others similarly situated and in the same state of suffering. The article dealt with the Prophet not as an individual but as the founder of Islam, and attempted to emphasize the futility of the Prophet's claims as the 'Intercessor' for his followers. It was held that to depict the founder of the Islam with his wives and numerous followers in Hell undergoing the tortures of the damned was bound to inflame the minds of Mahomedans in general against the writer of the article and that class who rightly or wrongly were believed by them to be behind him; that a scurrilous, vitupera-

1 *Chakravarti*, (1926) 54 Cal. 59.
2 *Jaswant Rai*, (1907) P. R. No. 10 of 1907.
3 *Joy Chandra Sarkar*, (1910) 38 Cal. 214.
4 *Chakravarti*, sup. *Hemendra Prasad Ghose*, (1926) 31 C. W. N. 168, 45 C. L. J. 432.
5 *Deshbandhu Gupta*, (1924) 6 L. L. J. 162.
6 *Iswari Prasad Sharma*, (1927) 46 C. L. J. 154.

tive and foul attack on a religion or on its founder would require a considerable amount of explanation to take it out of the substantive part of this section and bring it within the four corners of the explanation, and that the writer was guilty of an offence under this section[1] The liberty to criticise the religious belief of others does not include a license to resort to vile and abusive language The license of a missionary to advocate his own religion and to denounce other religions is not unlimited Holding up to obloquy and derision a religious belief would amount to stirring up resentment and hatred on the part of those who accept it as their creed There is no distinction between an attack upon a system of religion n the abstract and one upon the people who believe in it[2]

PRACTICE

Evidence —Prove (1) that the accused promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty s subjects

It is relevant to show the intention of the accused in writing the pamphlet complained of and also to prove that the allegations contained therein are based on facts as distinguished from rumour Evidence to show that the contents of the pamphlet are true or believed by the accused to be true would be relevant also *on the question of the sentence to be passed in the event of conviction*[3]

A person who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes may be prosecuted under this section but he cannot be proceeded against under s 108 Criminal Procedure Code[4]

(2) That he did so by words or by signs or by visible representations or otherwise

Procedure —Not cognizable—Warrant—Not bailable—Not compoundable —Magistrate Presidency or first class

Sanction —No Court shall take cognizance of this offence unless on complaint made by order of or under authority from Government[5]

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of the accused*) as follows —

That you on or about the——day of—— at—— by speaking (*or* writing) the words—(*or* by signs *or* visible representations viz —promoted (*or* attempted to promote) feelings of enmity (*or* hatred) between (*specify the classes*) of His Majesty s subjects and thereby committed an offence punishable under s 153 A of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

154 Whenever any lawful assembly[1] or riot[2] takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land[3], shall be punishable with fine not exceeding one thousand rupees,

Owner or occupier of land on which an unlawful assembly is held.

if he or his agent or manager[4], knowing that such offence is being or has been committed[5], or having reason to believe[6] it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police station,

1 *Devi Sharan Sharma* (1927) 28 P L R 497
2 *Kali Charan Sharma* (1927) 29 Cr L J 968
3 *Raj Lal* (1925) 7 Lah 15
4 *Chiranji Lal*, (1928) 50 All 854
5 Criminal Procedure Code s 196

and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

COMMENT.

The section declares in the first place that the owner of the land, on which a riot or unlawful assembly is committed or held, becomes punishable, if he or his agent or manager knowing that such offence is being committed or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof in his or their power at the nearest police station. (It will be observed that this portion of the section is extremely comprehensive in character, and embraces not only the past and present, but also the future.) The second provision makes it punishable on the part of the owner or his agent or manager, if he or they, 'having reason to believe that a riot was about to be committed', do not use all lawful means in his or their power to prevent it. The third imposes the same penalty, if in the event of a riot taking place he or they do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly[1].

The section contemplates three different breaches of duty:

(1) Omission to give notice of a riot or unlawful assembly;

(2) Abstention from preventing it; and

(3) Negligence to suppress it.

Many duties of the police are by law imposed on landholders. The present section proceeds apparently upon a presumption that, in addition to any such duty, the owner or occupier of land is cognizant in a peculiar way of the designs of those who assemble on his land, and is able not only to give the police notice, but also to prevent and to disperse and suppress the assembly[2]. Under s. 45 of the Criminal Procedure Code village headmen, accountants, landholders and others are bound to report certain matters to the nearest Magistrate or to the officer in charge of the nearest police-station.

1. **'Unlawful assembly'.**—See s. 141, *supra*.

2. **'Riot'.**—See s. 146, *supra*.

3. **'An interest in. . .land'** means any fragment of the ownership. The section would, therefore, apply to tenants and mortgagees, remaindermen and reversioners; but not to one merely entitled to a charge on land or to an easement[3].

It is impossible to punish in every case every person who has any interest in the land. The responsibility depends on the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or a manager of such person, and one of the facts to be proved is whose agent or manager the person fomenting the riot is.

4. **'Agent or manager'.**—The criminal liability of a person for the acts and omissions of an agent or manager depends upon the question by whom the latter was appointed. Where, therefore, it was shown that three Hindu *pardanashin* ladies had the management of the estate and were responsible for the appointment of the agent who had fomented the riot, and that their adopted sons had nothing to do with such appointment, though they took some share in the active manage-

1 Per Ameer Ali, J., in *Kazi Zeamuddin Ahmed*, (1901) 28 Cal. 504, 508.

2 M. & M. 128. See *Doma Sahu*, (1917) 2 P. L. J. 83.

3 Stokes.

ment of the estate, it was held that the ladies were alone liable[1] The accused was the sole proprietor of a village A serious riot involving loss of life took place at that village, and the accused s agent instead of doing anything to prevent or suppress the riot accompanied the rioters and stood close by, while the riot was going on after which he absconded The accused, who had no knowledge that a riot was likely to be committed was convicted under this section and fined It was held that the landlord was liable under this section for the acts of commission as well as omission not only of himself, but of his agent or manager[2]

5 **'Knowing that such offence, etc'**—The Allahabad High Court has ruled that it is not necessary in order to render the owner of land on which a riot takes place criminally liable that he should be aware of the likelihood of such an occurrence That his manager should have taken an active part in the riot is sufficient to warrant the conviction of the owner under this section[3] Similarly the Calcutta High Court has decided that knowledge on the part of the owner or occupier of the land, of the acts or intentions of the agent is not an essential element of an offence under this section, and he may be convicted under it though

held cannot as premeditated[5]

6 **'Reason to believe'** —See s 26, *supra*

Co-sharer —A non resident partner who has taken no active part in the management of the estate cannot like a resident sharer be convicted under this section[6]

No delay in prosecution —Prosecutions under this and the following sections should be instituted without delay, having regard to the object of the law laid down in these sections which is to impress upon landholders their responsibilities and obligations in respect of riots or unlawful assemblies committed under the circumstances mentioned in these sections and thus serve as wholesome warnings not only to persons concerned but also to others[7]

PRACTICE.

Evidence —Prove (1) that a riot took place

(2) That the land upon which it was committed was owned or occupied by the accused, or that the accused had, or claimed, an interest in the land upon which it was committed

(3) That the accused (or his agent or manager) knew that it was being, or had been, committed, or had reason to believe that such riot was likely to be committed

in his power to prevent such riot, or to suppress it if it had taken place[8]

1 *Sua Sundari Choudhrani* (1912) 39 Cal 834

2 *Kazi Zeamuddin Ahmed*, (1901) 28 Cal 504

O C 418

5 *Surroop Chundar Paul*, (1869) 12 W R (Cr) 75

6 *Radha Nath Choudhry* (1880) 7 C. L. R. 289

7 *Eshak Meah* (1902) 7 C. W N 245, *Sarat Chandra Shah Chowdhry* (1902) 7 C. W N 301

8 See *Tarakant Das*, (1900) 4 C. W N 691

Evidence taken in another case to which the accused were not parties was held inadmissible to convict them under this section. The records of another case would not of themselves be legal evidence for conviction[1].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

Liability of person for whose benefit riot is committed.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

COMMENT.

Under the preceding section the owner of land is punishable for the taking place of an unlawful assembly or riot on his land. This section requires that the unlawful assembly or riot should take place in the interest of the owner or any person claiming interest in the land. The section, therefore, imposes unlimited fine. The preceding section referred to an unlawful assembly as well as a riot: t[illegible]is section refers to riot only.

The principle on which this and the following sections proceed is to [illegible] t- to fine all persons in whose interest an affray is committed and the agen[illegible]f the persons, unless it can be shewn that they did what they lawfully could do [illegible] it the offence.

A zemindar ought not to be made liable under this section for a suc[illegible] and unpremeditated riot which there was no reason to infer he could have ant[illegible]ated or thought likely to happen[2].

PRACTICE.

Evidence.—Prove (1) that the riot was committed.

(2) That it took place with respect to some land, or that it arose out of some dispute.

(3) That the accused was the owner or occupier of such land, or claimed an interest therein, or claimed some interest in the subject of such dispute.

No conviction could be made unless it is shewn that the accused had property in the land[3].

(4) That such riot was committed for the benefit or on behalf of the accused, or that the accused accepted or derived some benefit therefrom.

(5) That the accused or his agent or manager had reason to believe (*a*) that such riot was likely to be committed; or (*b*) that the unlawful assembly which committed such riot, was likely to be held.

[1] *C. G. D. Betts and Mahomed Ismail,* (1871) 6 Beng. L. R. App. 83, 15 W. R. (Cr.) 6.

[2] *Hurnath Roy,* (1865) 3 W. R. (Cr.) 54.

[3] *Pramotha Nath Ray Chowdhry,* (1913) 17 C. W. N. 1247.

(6) That the accused his agent or manager did not respectively use all lawful means etc (*a*) to prevent such assembly or riot from taking place, or (*b*) for suppressing and dispersing the same

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Magistrate Presidency, first or second class—Summary trial

Where there is no evidence to show that an absentee co sharer in a zemindary takes an active part in the management and a resident co sharer has been sentenced to pay a fine under s 155 the non resident zemindar ought not to be convicted under this section[1]

Liability of agent owner or occupier whose benefit riot is committed

156 Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or the subject of any dispute which gave rise to the riot or who has accepted or derived any benefit therefrom,

the *agent or manager of such person* shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same

COMMENT

The last section punished the owner of land or any person claiming an interest in it, this section punishes the agent or manager of such person

PRACTICE.

Evidence —For points necessary to be proved see s 155 See also *Brac's case*[2] which lays down that to constitute an offence under this section it must be shown by legal evidence (1) that a riot was committed (2) that the riot if committed was committed for the benefit of the accused and (3) that the accused had reason to believe that a riot was likely to be committed

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency first or second class—Triable summarily

Harbouring persons hired for an unlawful assembly

157 Whoever harbours receives or assembles in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired[1], engaged or employed, to join or become members of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both

COMMENT.

Object —This section as compared with s 150, is of a wider application It provides for an occurrence that may happen and makes the harbouring receiving

1 *Harendra Lal Roy* (1904) 8 C W N 808 2 (1883) 10 Cal 338

or assembling, of persons who are likely to be engaged in any unlawful assembly, an offence. It contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an unlawful assembly[1].

1. **'Hired etc., or about to be hired, etc.'**—Under this section it must be proved that the persons were hired or about to be hired for the purposes specified therein. It is not sufficient to show that some of the accused's servants have been taken from a district where men bear a well-known character as *lathials* (men with clubs) and had been in his service some time before the riot[2].

PRACTICE.

Evidence.—Prove (1) that the house or premises in question was or were in the occupation or charge of, or under the control of, the accused.

(2) That the accused harboured, received, or assembled therein the persons in question.

(3) That such persons had been hired, engaged, or employed, or were about to become so, to join or become members of an unlawful assembly.

(4) That when the accused did as in (2) he knew that such persons had been so hired, etc., for that purpose.

Procedure.—Cognizable Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Summary trial.

Being hired to take part in an unlawful assembly or riot;

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both;

or to go armed.

and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon[1] or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to punish those persons who hire themselves out as members of an unlawful assembly or assist any such members. It is divided into two parts. Higher penalty is awarded where the accused is armed with a deadly weapon.

1. **'Deadly weapon'.**—Such as, firearms, swords, etc. Whether a particular thing is a deadly weapon or not is a question of fact depending upon the special circumstances of each case.

PRACTICE.

Evidence.—Prove (1) the engagement or hiring of the accused; or the offer or attempt by the accused to become so.

(2) That the object of such engagement or hiring was to do, or assist in doing, an act which would make an assembly an unlawful one (see s. 141).

[1] *Ram Lochan Sarcar*, (1901) 29 Cal. 214.

[2] *Rahda Nath Choudhry*, (1880) . 289.

Prove also (for the last part of the section) whether the accused went or offered to go armed with a deadly weapon

clause)
trate, I
of the section

Charge —I (*name and office of Magistrate, etc*), hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, engaged or hired (*or* offered *or* attempted to be hired *or* engaged) to do or assist in doing (*here specify the act which amounts to an offence under* s 141) and went armed (*or* offered to go armed) with a deadly weapon (*or* with—which used as a weapon of offence was
s 158 of the Indian

159 When two or more persons[1], by fighting in a public place[2], disturb the public peace[3], they are said to "commit an affray".

Affray

160 Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both

Punishment for committing affray

COMMENT.

The word 'affray' is derived from the French word *effrayer*, to terrify, and in a legal sense, it is taken for a public offence to the terror of the people From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray, as where it happens in a private place out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people[1] No quarrelsome or threatening words whatsoever shall amount to an affray[2] An affray is an offence against the public peace because it is committed in a public place and is likely to cause general alarm and disturbance

Ingredients —The section has three essentials —

1
2
3 peace

1. 'Two or more persons.'—The fight must be between two or more persons

2. 'Public place'.—"A public place is one where the public go, no matter whether they have
on private propert
It is obvious that
Court has to consider is, was a particular place at the time public ?—a place where the public undoubtedly were[4] Where a quarrel arose between four persons

[1] 1 Hawk, s 1, p 487

[2] 1 Hawk, s 2, *Angappanasari*, (1893) 1 Weir 71

[3] Per Grove J, in *Wellard*, (1884) 14 Q. B D 63 67, *Hari Singh v Jadu Nandan*, (1903) 31 Cal 542, *Musa*, (1916) 40 Mad 556, *Govindarajulu*, (1915) 39 Mad 886, *Ramlaranlal* (1916) 13 N L R 68

[4] *Wellard*, sup, p 66

stationed at the entrance of a temple for the purpose of collecting fees and three other persons who wished to enter the temple without previous payment of the fet demanded, it was held that this offence was committed[1]. Where two persons mee and after abuse came to blows and each struck the other down while others had also joined the fight and one of them died of the injuries received, but there was no evidence as to who the assailant was, it was held that any offence beyond an affray had not been committed[2].

Public places.—An omnibus[3], a railway platform[4], a public urinal[5], a goods yard of a railway station[6], an unfenced compound[7], a place forming part of the compound of a Hindu temple[8], and harbour premises[9], are public places.

Not public places.—A private *chabutra* adjoining a public thoroughfare[10], a railway station and platform at a time when no train is due except a goods-train[11], and a private garden[12], are not public places.

3. 'Disturb the public peace'.—It is essential that there must be a disturbance of the public peace. The offence under this section postulates the commission of a definite assault or breach of the peace. Mere quarrelling in a street over money matters without exchange of blows is not sufficient[13].

Affray and riot.—An affray differs from a riot. The former cannot be committed in a private place, and does not require five or more persons; the latter requires at least five persons, and can be committed in a private place.

Affray and assault.—An affray differs from an assault. The one must be committed in a public place; the other may take place anywhere. The former is regarded as an offence against the public peace; the latter, against the person of an individual. An affray is nothing more than an assault committed in a public place and in a conspicuous manner, and is so called because it affrighteth and maketh men afraid.

PRACTICE.

Evidence.—Prove (1) that the accused and another person, or other persons, were fighting.

In an affray specific evidence as to the acts of each fighter cannot be expected; mere general evidence as to the accused taking part in it will be sufficient[14].

(2) That such fight was in a public place[15].

(3) That the fight disturbed the public peace[16].

A conviction under this section, on a prosecution initiated by the police, would be no bar to a subsequent trial under s. 323 on a complaint laid by the party injured[17].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

1 (1879) 1 Weir 71.
2 *Langar*, (1912) P. W. R. (Cr.) No. 32 of 1912.
3 *Holmes*, (1853) 3 C. & K. 360.
4 *Davis*, (1857) 26 L. J. Exch. 393.
5 *Harris*, (1871) L. R. 1 C. C. R. 282; but see *Orchard*, (1848) 3 Cox 248.
6 *Cawasji* v. *G. I P. Ry.*, (1902) 4 Bom. L. R. 290, 26 Bom. 609.
7 *Hari Singh* v. *Jadu Nandan*, (1903) 31 Cal. 542.
8 *Musa*, (1916) 40 Mad. 556.
9 *Govindarajulu*, (1915) 39 Mad. 886.
10 *Sri Lal*, (1895) 17 All. 166.
11 *Madan Mohan*, (1883) 3 A. W. N. 197.
12 *Nga Chet Kyi*, (1885) S. J L. B. 333.
13 *Ganesh Das*, (1928) 30 Cr. L. J. 571; *Kallasani*, (1927) 29 Bom. L. R. 1478, 9 Bom. Cr. C. 160, *distinguished in Dodhu Kalu*, (1929) 31 Bom. L. R. 922, 10 Bom. Cr. C. 200.
14 *Moher Sheikh*, (1893) 21 Cal. 392.
15 *Vadde Ramugadu*, (1882) 1 Weir 71.
16 *Ibid.*
17 *Ram Sukh*, (1924) 47 All. 284.

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CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS

THIS Chapter deals with two classes of offences, of which one can be com d by public servants alone, and the other comprises offences which relate to servants, though they are not committed by them

'Those offences which are common between public servants and other bers of the community, we leave to the general provisions of the Code If a servant embezzles public money, we leave him to the ordinary law of nal breach of trust If he falsely pretends to have disbursed money for the , and by this deception induces the Government to allow it in his accounts ave him to the ordinary law of cheating If he produces forged vouchers to his statement, we leave him to the ordinary law of forgery We see no reason mishing these offences more severely when the Government suffers by them when private people suffer A Government, indeed, which does not consider ufferings of private individuals as its own, is not only selfish but short sighted selfishness The revenue is drawn from the wealth of individuals, and every f dishonest spoliation which tends to render individuals insecure in the enjoy of their wealth is really an injury to the revenue On every account fore, we think it desirable that the property of the state should in general otected by exactly the same laws which are considered as sufficient for th c

s be punished by h of some of the ractices otice of certain

161. Whoever, being or expecting to be[1] a public servant[2], accepts or obtains, or agrees to accept, or attempts to obtain[3] from any person for himself or for any other person[4], any gratification whatever, other than legal remuneration[6], as a motive or reward[7] for doing or forbearing to do official act[8] or for showing or forbearing to show, in the ercise of his official functions, favour or disfavour to any son, or for rendering or attempting to render any service or ervice to any person[9], with the Legislative or Executive ernment of India[10], or with the Government of any Presi cy[11], or with any Lieutenant-Governor, or with any public ant, as such, shall be punished with imprisonment of either ription for a term which may extend to three years, or with , or with both.

blic servant g gratification than legal eration in re of an official

Explanations.—"Expecting to be a public servant". If a son not *expecting to be in office obtains a gratification by* eiving others into a belief that he is about to be in office, and t he will then serve them, he may be guilty of cheating, but s not guilty of the offence defined in this section

[1] Note E, p 121

"Gratification". The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which is permitted by the Government which he serves, to accept.

"A motive or reward for doing". A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

ILLUSTRATIONS.

(a) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(b) A, holding the office of Resident at the Court of a subsidiary Power, accepts a lakh of rupees from the Minister of that Power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(c) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

COMMENT.

This section deals with the acceptance by a public servant of an *illegal* gratification or bribe "as a motive or reward for doing, or forbearing to do, any official act, or for showing, or forbearing to show, in the exercise of his official functions, favour or disfavour to any person"[1].

Not only a public servant *in esse* but also one who expects to be a public servant *in posse* comes within the purview of this section.

Scope.—This section refers only to the taker and not to the giver of the bribe. The giver or offerer is brought under s. 116 by the doctrine of abetment[2].

1. **'Expecting to be'.**—"If a person expecting to be appointed to a public office obtains money from another as the price of favour to be shewn to that other in the exercise of his functions in that office, he is surely as corrupt as one who does the same being actually in office. It must be proved of course that he gave the other party reason to believe that he was about to obtain the office, it must be proved also,...that he himself expected to obtain it. In practice the provision would probably be brought into action only against persons who after having obtained the expected office are found guilty of the previous corrupt transaction, and generally only against persons who having obtained the expected office have acted officially in the corrupt manner previously promised"[3].

2. **'Public servant',**—A person who *de facto*, though wrongly, discharges the duties of an office through which he apparently figures as a public servant,

1 *Srilal Chamaria,* (1918) 46 Cal. 607, 616.
2 *Venkatarama Naidu,* (1929) 57 M. L. J. 239.
3 2nd Rep., s. 66, p. 359.

may be tried for getting a bribe[1]. See s 21, *supra*, as to the definition of 'public servant'

3. 'Obtains or agrees to accept or attempts to obtain'.—The use of these words shows that solicitation by a public servant or other person was contemplated in framing the provisions of the Penal Code on the subject, and there is … abetment the species of abet- … ishes of the principal offender[2]

It is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained, so long as it can be clearly established by evidence that it was obtained[4]

4. 'Any other person'.—The other person may or may not be a public servant, and therefore wholly unconnected with the official conduct[5]

5. 'Gratification' includes all gratifications of appetite and all honorary distinctions

The words of the section exclude the defence that the benefit bargained for was to go to somebody else, and also the notion that an officer is protected if he agrees to let his official acts be swayed by the motive of accepting a gratification to be used for advancing some public not private object, such as, charity, science, or religion The *mahars* of a village having been suspended from their office, a meeting of the villagers was held at the house of the village Patel to consider the question of their restoration to office, and an agreement was come to that they should be restored on their paying Rs 300 towards the repair of a temple It was held that the Patel being a public servant had committed this offence[6]

Cases —A *putwari* who took grain as a consideration for showing favour to the giver in discharge of his functions as a *putwari* was held guilty of an offence under this section[7] The taking of a bribe by a head clerk to influence a Principal Suddar Ameen in his decisions was held sufficient for a legal conviction whether the head clerk did or did not influence or try to influence that officer[8] A *kulkarni* … worked … or they … e money It was held that he had committed this offence[9] Where the Colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant of the regimental canteen, it was held that he was guilty of bribery[10] Where a constable and others entered into a house and apprehended certain persons as gamblers, and afterwards released them on payment of a sum of money by the latter, it was held that the offence committed was that of taking a bribe as regards the constable, and abetment of that offence as regards the others[11]. Where a Subordinate Judge went in company with a litigant in his Court to a cloth shop and accepted a present of cloth which was paid for by that litigant to gain favours with the Judge in his suit, it was held that the Judge was guilty of an offence under this section[12]

1 *Ramkisto Doss*, (1871) 16 W. R (Cr) 27
2 *Ma Ka*, (1895) 1 U B R (1892 1896) 158
3 *Bildeo Sahai*, (1879) 2 All 253
4 *Tapeshri Prasad*, (1916) 15 A L J 127
5 *Bhagwandas Kanji*, (1907) 9 Bom L. R 331, 31 Bom 335
6 *Appaji bin Yadavrao* (1896) 21 Bom 517, 520, *Amiruddin Salebhoy*, (1922) 24 Bom L R 534, 543, 544, 6 Bom Cr C 207
7 *Nuds-ood Deen*, (1870) 2 N W P 148
8 *Kaleechurn Serishtadar*, (1865) 3 W R (Cr) 10
9 *Krishnaji Ganesh*, (1898) Unrep Cr C 955
10 *Whitaker*, [1914] 3 K B 1283
11 *Mahomed Hossein*, (1866) 5 W. R (Cr) 49.
12 *Bhimrao Narsimha Hublikar*, (1924) 27 Bom L. R 120, 8 Bom Cr C. 16, *Jehangir Cama* (1927) 29 Bom L. R 996, 9 Bom Cr C 133, *Govind Balwant Laghate*, (1916) 18 Bom L. R 266 3 Bom Cr C. 171

6. **'Legal remuneration'** means what is given to a public servant by the Government which he serves or by any person having authority from that Government to give,—or what is given to him by any person whosoever, if the Government *permits him to accept the gift*[1].

The word "Government" in the definition of "legal remuneration" includes a Court of Wards[2], the Senate of the Allahabad University[3], an employer of a railway servant[4], a municipal board under the United Provinces Municipal Act[5] and a Cantonment authority[6].

7. **'A motive or reward'.**—It is essential that a bribe should be otained 'as a motive or reward'[7]. This phrase evidently means "on the understanding that the bribe is given in consideration of some official act or conduct". Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances[8]. A bribe is not the less a bribe because its payment is postponed[9]. When a bribe has been given it is immaterial to inquire what effect, if any, the bribe had on the mind of the receiver[10].

The explanation of this phrase as given in the section will not allow a public servant to justify his acceptance of a gift or bribe by urging that the order passed by him was nevertheless a just one and against the very person from whom he had received the bribe. Thus, it guards against such a plea as was set up as an excuse for Lord Bacon. "It is pretended", says Mr. Hume in his History, "that Bacon had still in the seat of justice, preserved the integrity of a Judge, and had given just decrees against those very persons from whom he had received the wages of iniquity".

"The term 'reward' is manifestly intended to apply to a 'past service' What is forbidden speaking generally is the receiving any gratification 'as a motive' to do, 'or a reward' for having done any such thing as is described in the definition"[11].

8. **'Official act'.**—It must be an act or omission in connection with the official functions of the accused. If it is not an act of official duty the receipt of money may be some other offence, but it is not a bribe, e.g., if a police-man arrests a man outside his jurisdiction and releases him on receiving a sum of money, this is not a bribe, for it is no part of his official duty to make the arrest. He may be liable for some other offence. Some village watchmen found a widow at the shop of a certain goldsmith at night, and the goldsmith gave them a reward to hold their tongues and to prevent them from being disgraced. It was held that they were not guilty of any offence[12]. Because to keep silence on a private matter, which is in no way concerned with any matter of the police, much less of crime, and which the watchmen had no business to make the subject of official report, or mention to any person, is unconnected with the "doing or forbearing to do any official act", or with "showing or forbearing to show, in the exercise of their official functions, favour or disfavour to any person". Where two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and the other accused, whose papers and books he had seized for bringing them to legal

[1] M. & M. 137.

[2] Bombay Court of Wards Act (Bom. Act I of 1905), s. 21 (2); Central Provinces Government Wards Act (XXIV of 1899), s. 12; the United Provinces Court of Wards Act (U. P. Act III of 1899), s. 30; the Ajmere Government Wards Regulation (I of 1888), s. 11 (2), the Punjab Court of Wards Act (Punjab Act II of 1903), s. 42 (3).

[3] The Allahabad University Act (XVIII of 1887), s. 18 (2).

[4] The Indian Railways Act (IX of 1890), s. 137 (1).

[5] U. P. Act II of 1916, s. 84.

[6] The Cantonments Act (II of 1924), s. 36A.

[7] *Upendra Nath Chowdhury*, (1916) 21 C. W. N. 552.

[8] *Bhagwanadas Kanji*, (1907) 9 Bom. L. R. 331, 31 Bom. 335.

[9] *Indra Nath Banerjee* v. *E. G. Rooke*, (1909) 14 C. W. N. 101.

[10] *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; followed in *Indra Nath Banerjee* v. *E. G. Rooke*, sup.; *Harrington* v. *The Victoria Graving Dock Co.*, (1878) 3 Q. B. D. 549.

[11] 2nd Rep., s. 67, p. 359.

[12] *Abdul Aziz*, (1883) 3 A. W. N. 179.

punishment, it was held that the offence committed did not fall under this section and s 109, but under s 214[1] Where the allegation made was that a Police Sub Inspector helped a candidate for the Legislative Council as he got "silver tonic", it was held that this did not amount to a charge of bribery as contemplated as canvassing for votes at a council election was not an "official act" [2]

The Allahabad High Court is of opinion that it is sufficient if the accused thought that a particular public servant had an opportunity to show him favour in the exercise of his official functions although he might in reality have no such opportunity[3] All that is necessary to prove the offence is that a public servant had promised to show favour in the exercise of his official functions although he

[illegible]

official act of a *karnam*[5] Where a person, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio* offers a bribe to him, he commits no offence by doing so and presumably the public officer would commit no offence by taking it[6] The same is the view of the Lahore High Court[7]

It is an offence even when the act to be done in return for the bribe is a just and proper act It is not necessary to show that as a matter of fact favour was shown to the person who offered the bribe It is sufficient if the person giving the gratification is led to believe that the official act would go against him if he did not give gratification[8]

The performance of the act which is consideration for the bribe is not essential

9 **'Rendering or attempting to render any service or disservice to any person'.**—It is an offence if a public servant accepts any gratification as a motive or reward for rendering any service to any one with any public servant as such Where the accused made an offer to the manager of a municipal office of a reward of Rs 200 for using his influence with the chairman and other councillors to get from them a contract for a third person, it was held that he was guilty of an offence under this section[9]

10. **'Government of India'.**—See s 16, *supra.*

11 **'Presidency'.**—See s 18, *supra*

Accomplice —The mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co operated in the payment of the bribe, or was instrumental in the negotiations for the payment[10]

Offer of bribe amounts to abetment.—' [illegible]
an illegal gratification for any of the purposes stat [illegible]
abetment of an offence under this section[11] ' Th [illegible]
[illegible] If the
giver of
.tion (a)

1 *Megraj* (1880) P R No 13 of 1881
2 *Nirsu Narayan Sinha* (1926) 6 Pat 224
3 *Kishan Lal* (1904) 1 A L J 207 (n)
4 *Ajudhia Prasad* (1929) 51 All 467
5 *Venkiah* (1924) 47 M L J 662
6 *Venkatarama Naidu* (1929) 57 M L J 239 Coutts Trotter C J, points out the necessity of amending this section
7 *Ajudhia Parshad* (1924) 1 Lah C 227
8 *Bhimrao Narasimha Hublikar* (1924) 27 Bom L R 120 8 Bom Cr C 16
[illegible]

of the latter section. If the bribe is not accepted, the public servant commits no offence, but the person who offers the bribe is still punishable under section 161 read with section 116. The case is again put in Illustration (a) of section 116. In both cases the offence committed by the person who offers the bribe is according to the scheme of the Code an abetment of the offence described in section 161"[1].

A mere offer to pay an illegal gratification to a public servant, although no money or other consideration is actually produced, amounts to an attempt to bribe[2]. If a party offers a bribe to a judge, meaning to corrupt him in a cause depending before him; and the judge taketh it not; yet this is an offence punishable by law in the party that offers it[3]. To bribe or to attempt to bribe a public servant is only punishable under the Penal Code as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification. Illustration (a) to s. 116 is only an example of abetment of an offence under this section. There are many other ways of instigating a public servant to commit an offence under this section besides by means of a direct offer of a bribe[4]. If a public servant allows illegal gratification to be delivered, but not in order to its acceptance, but merely for the purpose of having complete evidence of the transaction, the person offering the gratification will be punished for abetment under s. 116[5]. A person offered a bribe to a Magistrate by thrusting currency notes into his hands. His defence was that he did so with a view to lay a trap as the Magistrate was known to be a corrupt official. It was held that his act amounted to abetment of the offence under this section[6]. Even if a public servant is corrupt and solicits a bribe directly or indirectly, the giving him of a bribe is none the less an abetment of his offence[7]. The distinction between an offer and an invitation for offers to be made is well recognised in the law of contracts, and there is no reason why in a criminal case the same distinction should not be observed, if the sole question is whether an offer has been made or not[8]. The authors of the Code, however, say: "The person who, without any demand express or implied on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the general rule (law of abetment)... as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment...We are strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who, unless temptation had been put in his way, would have acted uprightly"[9].

Where the accused offered Rs. 500 to a railway goods clerk deputed to assist the police in enquiring into frauds in the Goods office, it was held that he was guilty of abetment[10].

The accused, a taxi-driver, was prosecuted for an offence under the Motor Act. The case against him was dismissed. On the following day he was said to have offered Re. 1 to a police officer as a bribe to withdraw the charge which the police officer had brought against him. It was held that the accused could not be convicted of abetment of an offence under this section[11].

1 *Srilal Chamaria*, (1918) 46 Cal. 607, 616.

2 *Ramadhar Singh*, (1924) 3 Pat. 647. See *Vasu Ramachandriah*, (1927) 51 Mad. 86.

3 *Vaughan*, (1769) 4 Burr. 2494, 2501.

4 *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 6 Bom. Cr. C. 207.

5 *Raghudatt Singh*, (1894) 1 U. B. R. (1892-1896) 154; *Nga Hnin*, (1917) 9 L. B. R. 52; *Abad Shah*, (1917) P. R. No. 18 of 1918.

6 *Lakshminarayana Aiyar*, [1917] M. W. N. 831, 22 M. L. T. 373.

7 *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

8 *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 6 Bom. Cr. C. 207.

9 Note E, pp. 126, 127.

10 *Zakaria*, (1898) P. R. No. 9 of 1898; *Mahomed Hossein*, (1866) 5 W. R. (Cr.) 49.

11 *Shamsul Huq*, (1920) 33 C. L. J. 379.

Attempt.—To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms[1] B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant

rejection of it It was held that the offence of attempting to obtain a bribe was consummated[2] Similarly, a demand of money by a Court peon from the plaintiff, as a motive or reward for serving summonses on his witnesses without an identifier, was held to be an attempt to obtain an illegal gratification[3].

Statutory application —See the Bombay Vaccination Act (Bom Act I of 1877), s 25, the Karachi Vaccination Act (Bom Act IV of 1879), s 25, the Bombay Port Trust Act (Bom Act VI of 1879), s 79, the Aden Port Trust Act (Bom Act V of 1888), s 68, the United Provinces District Boards Act (U P Act III of 1906), s 41, the Bombay City Municipalities Act (Bom Act XVIII of 1925), s 56 (1)

PRACTICE.

Evidence.—Prove (1) that the accused at the time of the offence was, or expected to be, a public servant

(2) That he accepted, or obtained, or agreed to accept, or attempted to obtain from some person a gratification

(3) That such gratification was not a legal remuneration due to him

(4) That

(a) doing, or forb

favour or disfavo

rendering, or attempting to render, any service or disservice to some one, with the Legislative or Executive Government, etc, or with any public servant

Conclusive evidence is required to establish a charge of bribery against a public servant or of his having committed an offence in the discharge of his public duties[4]

The section does not require any particular criminal intention in the minds of the giver or receiver of the bribe[5]

Evidence as to general reputation admissible.—In a prosecution by a judicial officer on the ground that the accused had stated that he was compelled by the complainant to give the latter a bribe, the evidence as to his having taken a bribe on specific occasions was considered irrelevant, but the accused was held entitled to show that the complainant had the reputation of being a bribe taker As such a fact goes towards the mitigation of damages in a civil action, so it affects the sentence to be passed in a criminal case if the accused happens to be convicted[6].

1 *Baldeo Sahai*, (1879) 2 All 253
2 *Ibid*
3 *Ratan Moni Dey* (1905) 32 Cal 292
4 *Mehr Ilahi* (1911) P W R (Cr) No 26 of 1911
5 *Lakshminarayana Aiyar*, [1917] M W N 831, 22 M L T 373
6 *Devi Dayal*, (1922) P W R (Cr) No 2 of 1923
7 *Deo Nandan Pershad*, (1906) 33 Cal 649 See *Chagan Dayaram*, (1890) 14 Bom 331, *Malhar Martand Kulkarni*, (1901) 26 Bom 193, 3 Bom L R 694

The testimony of a bribe-giver must be corroborated in material particulars[1]. Raising money for the purpose of giving a bribe and the merits of the case to decide which in favour of the bribe-giver a Judge accepts the illegal gratification are sufficient to corroborate the former who is really an accomplice[2].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

Sanction.—Sanction of Government is necessary for prosecution of Judges, Magistrates and public servants not removable from their office without the sanction of Government[3]. Thus, a District Munsiff cannot be prosecuted without a sanction[4]; but a Police Patel[5] and a Municipal Corporator[6] can be. If a Judge has not done an act in the capacity of a Judge no sanction is necessary[7].

Joinder of charges.—Where a bribe was collected from certain inhabitants of a village by subscription and handed over to the recipient in a lump sum, it was held that the recipient could not be charged under this section merely with the receipt of the whole sum collected, but that he must be charged in respect of not more than three separate items constituting the total collection[8]. The former Chief Court of the Punjab, after distinguishing this case, held that where sums of money were collected from various persons of a village and paid to a public servant in a lump sum as illegal gratification, one charge of having received that lump sum was legal and not open to objection on the ground of misjoinder of charges[9].

Charges.—The charge should always state the nature of the office held by the accused so as to make him a public servant[10], and the name of the person from whom the gratification was obtained[11]. It should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, directly accepted from (*state the name*), for another party (*state the name*), a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under s. 161 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[12].

Punishment.—A simple order to refund a bribe is quite inadequate to the gravity of the offence under this section[13]. The Law Commissioners observe: "The punishment of fine will, we think, be found very efficacious in cases of this description, if the Judges exercise the power given them, as they ought to do, and compel the delinquent to deliver up the whole of his ill-gotten wealth"[14].

Separate conviction.—Where a certain sum of money is paid to a public servant as illegal gratification on one day and a certain sum on another day for the same purpose, the offence of receiving illegal gratification becomes a continuous

1 *Hira Lal*, (1918) P. L. R. No. 63 of 1918; *Muhammad Usuf Khan*, (1928) 30 Cr. L. J. 311.

2 *Harsukh Rai*, (1918) P. W. R. (Cr.) No. 3 of 1919. See, however, *Khadam Ali*, (1919) P. W. R. (Cr.) No. 15 of 1919.

3 Criminal Procedure Code, s. 197.

4 (1871) 6 M. H. C. App. 21; *Gulam Muhammad Sharif-ud-daulah*, (1886) 9 Mad. 439; *Ponnuswami Thevar*, (1921) 15 L. W. 199.

5 *Bhagwan Devraj*, (1879) 4 Bom. 357.

6 *The Municipal Corporation of Calcutta*, (1878) 3 Cal. 758.

7 *Palaniandy Pillai* v. *Arunachellum Pillai*, (1908) 32 Mad. 255.

8 *Nand Lal*, (1904) 24 A. W. N. 223. See *N. A. Subrahmania Ayyar*, (1901) 28 I. A. 257, 25 Mad. 61, 3 Bom. L. R. 540.

9 *Girdhari Lal*, (1911) P. W. R. (Cr.) No. 32 of 1911.

10 (1865) 5 W. R. (Cr. L.) 8.

11 *Setul Chunder Bagchee*, (1865) 3 W. R. (Cr.) 69.

12 Crim. P. C., Sch. V, No. xxviii (1) (3).

13 *Mutty Lall Chuttopadhya*, (1871) 16 W. R. (Cr.) 74.

14 Note E, p. 123; 2nd Rep., s. 63, p. 358.

offence and there ought not to be seperate convictions for offences under this section and s 165 for the same offence[1]

Taking gratification in order by corrupt or illegal means to influence public servant

162 Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person[1], any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant Governor, or with any member of the Senate of the Allahabad University, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

COMMENT

A person, who accepts for himself or for some other person, a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act is punishable under this section[2] Under this section the public servant is to be induced by corrupt or illegal means The next section deals with the case where the *public servant is induced by personal influence*

To admit solicitation of a bribe by a third person without the privity or connivance of the public servant concerned as an excuse for giving a bribe to such public servant is an absolute absurdity[3]

1. 'For any other person' —These words must be read so as to include everyone other than the actual recipient of the gratification[4]

Amendment —The words "or with any member of University" were inserted by Act XVIII of 1887, s 18 (2)

PRACTICE

Evidence —Prove (1) that the accused accepted, or obtained, or agreed to accept, or attempted to obtain, from some one, for himself or for some one else, a gratification

(2) That he accepted, etc , the same, as a motive or reward to induce, by corrupt or illegal means a public servant (*a*) to do or forbear to do an official act, or (*b*) to show, in the exercise of his official functions, favour or disfavour to some person, or (*c*) to render or attempt to render, any service or disservice to some person with the Legislative, or Executive Government, etc , or with any public servant as such

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class

1 *Jagat Chandra Sarma* v *Lal Chand Das* (1901) 5 C W N 332

2 *Abhoy Churn Chuckerbutty* (1865) 3 W R (Cr) 19 *Hira Lal* (1918) P L R No 63 of 1918 P W R (Cr) No 18 of 1918

3 *Ma Ka* (1895) 1 U B R (1892 1896) 158

4 *Nemichand* Criminal Appeal No 47 of 1915 decided on January 19, 1916 (Unrep Bom)

A conviction under this section cannot be had if the evidence does not show the person or persons from whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, accepted (*or* obtained, *or* agreed to accept, *or* attempted to obtain) from——for yourself (*or* for)——, a gratification (*this should be specified*) as a motive or reward for inducing, *by corrupt or illegal means,——a public servant, to do (or to* forbear to do) an official act, viz.,——[*or* to show favour (*or* disfavour) to—] [*or* to render (*or* attempt to render) a service (*or* disservice) to—] with the Legislative (*or* Executive) Government of India (*or* with the Government of any Presidency, or with any Lieutenant-Governor, etc.,) and thereby committed an offence under s. 162 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Taking gratification for exercise of personal influence with public servant.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any member of the Senate of the Allahabad University, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

ILLUSTRATION.

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust,—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

COMMENT.

Section 162 and this section apply to cases where the person exercising corrupt or undue influence takes gratification from a third person. If he does so without receiving any gratification no offence will be committed under either of these sections. He may, however, be guilty as an abettor of the offence under s. 161.

Under s. 162 the gratification is taken, in order 'by corrupt or illegal means', to influence a public servant. Under this section it is taken for the 'exercise of personal influence' with a public servant. Both these sections extend also to attempts.

Amendment.—The words "or with any member of...University" were inserted by Act XVIII of 1887, s. 18 (2).

1 *Setul Chunder Bagchee,* (1865) 3 W. R. (Cr.) 69.

PRACTICE.

Evidence —Prove the same points as for s 162 except that in (2) proof of 'personal influence should be given instead of corrupt or illegal means'

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class

Charge —See s 162 and substitute for ' by corrupt or illegal means' the words ' by the exercise of personal influence

Punishment for abetment by public servant of offences defined in section 162 or 163

164 Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both

ILLUSTRATION

A is a public servant B A s wife receives a present as a motive for soliciting A to give an office to a particular person A abets her doing so B is punishable with imprisonment for a term not exceeding one year, or with fine or with both A is punishable with imprisonment for a term which may extend to three years or with fine, or with both

COMMENT.

This section is one of the express provisions' made by the Code for the [illegible] an offence which [illegible] an offence See

PRACTICE

Evidence —Prove (1) that the accused was a public servant

(2) That as such he abetted an offence punishable under s 162 or this section Establish abetment under s 107

(3) That an offence under s 162 or this section was committed

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Court of Session Magistrate, Presidency or first class

Charge —I (*name and office of Magistrate, etc*) hereby charge you (*name of*

[illegible] ie com [illegible] y com [illegible] within [illegible] *words*

Public servant obtaining valuable thing without consideration from person concerned in proceeding or business transacted by such public servant

165 Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about

to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

COMMENT.

The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, is made penal by this section. Under s. 161 the gratification is taken as a motive or reward for doing or forbearing to do an official act; under this section the question of motive or reward is not material as the section prohibits the taking of a thing without consideration from a person having any connection with the official functions of the public servant. There is no absolute prohibition, but the limit is drawn by the framers of the Code who say:

"Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No Government would wish to prevent persons intimately connected by blood, by marriage or by friendship, from rendering services to each other; and no tribunals would enforce a law which would make the rendering of such services a crime. Where no such close connexion exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding: but a lime, a wreath of flowers, a slice of betel-nut, a drop of atar of roses poured on his handkerchief, are presents which it would in this country be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents, of more value than these, may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed, according to the usages of hospitality, are presents of this description; it would be unreasonable to treat a man in office as a criminal, for drinking many rupees-worth of champagne in a year, at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment"[1]. If a public servant was allowed to take presents he might be induced to take a bribe in the shape of presents.

1 Note E, pp. 123, 124.

A police-officer, employed to bring up each case with the witnesses for trial, asked for and obtained one rupee from the prosecutor in a case after the prosecution had ended It was held that he was guilty of an offence under this section and not under s 161[1]

This section does not prohibit a sale or purchase by a public servant, at a fair price, to or from a person transacting business before him[2]

If a person being in any way connected with the official functions of a public servant induces him to accept anything for an inadequate consideration he abets the offence mentioned in this section

By the Government of India Act[3], the receiving of gift, gratuity or reward pecuniary or otherwise by any one holding any office under the Crown in India is punishable as a misdemeanour

PRACTICE

Evidence —Prove (1) that the accused is a public servant

(2) That he has accepted or obtained, or has agreed to accept or has attempted to obtain for himself or for some one else a valuable thing

(3) That he gave no consideration for it, or gave a consideration which he knew to be inadequate

(4) That the person from whom the accused accepted etc, the same was known to the accused to have been, or then was or was likely to be concerned in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official functions of himself or of a public servant to whom the accused was subordinate or from person known to the accused to be interested in or related to the person so concerned As to the non admissibility of the evidence of similar but unconnected instances of receiving illegal gratifications, see *Vyapoory Moodeliar s* case[4]

Procedure —Not cognizable—Summons—Bailable—Not compoundable —Magistrate, Presidency, first or second class

Charge — I (*name and office of Magistrate, etc,*) hereby charge you (*name of accused*) as follows —

That you being a public servant in the——Department, accepted (*or* obtained etc) for yourself (*or* for——) a valuable thing viz,—— without consideration (*or* for consideration which you knew to be inadequate) from——whom you knew to have been concerned in a proceeding (*or* business transacted by you) viz,——, [whom you knew to be interested in or related to the person so concerned] and thereby committed an offence punishable under s 165 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

Public servant disobeying law with intent to cause injury to any person

166 Whoever, being a public servant, knowingly disobeys any direction of the law[1] as to the way in which he is to conduct himself as such public servant intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both

ILLUSTRATION

A, being an officer directed by law to take property in execution in order to satisfy a decree pronounced in Z s favour by a Court of Justice, knowingly disobeys

[1] *Kampta Prasad* (1877) 1 All 530
[2] Stokes, Vol I p 151
[3] 5 & 6 Geo V c 61, s. 124 (5)
[4] (1881) 6 Cal. 655.

that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

COMMENT.

The offence made punishable by this section consists, not in an inadvertent or even careless, but in a wilful departure from the direction of the law intending to cause injury to any person. There must be a wilful disobedience of an express direction of the law, and a disobedience to an order is not sufficient, even though that order may be one that is given under a provision of law[1]. A mere breach of departmental rules will not bring a public servant within the purview of this section.

1. 'Direction of law'.—It may be a direction given by a written law or a mandate proceeding from a competent authority which the public servant is bound by law to obey—as a writ or order for the liberation of a person from prison[2]. If the direction of law given by a special Act is violated, the punishment will be under that Act. Thus, a postal official absenting himself from his station without leave will be charged under the Post Office Act and not under this section[3]. Where a peon whose duty it was to require the signature of a person on whom a notice was served represented the notice to be a warrant and arrested him, it was held that he had disobeyed a direction of law and that he was guilty under this section[4].

2. 'Injury'.—See s. 44, *supra*.

English law.—Neglect of official duty is a misdemeanour according to English law, if the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

Statutory application.—See the Indian Evidence Act (I of 1872), s. 162; the Indian Christian Marriage Act (XV of 1872), s. 72.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he conducted himself in the particular manner charged.

(3) That such conduct was in the exercise of his public duties as such servant.

(4) That such conduct was in disobedience to a direction of law.

(5) That when the accused disobeyed such direction of law, he did so knowingly.

(6) That when the accused was guilty of such disobedience, he thereby intended or knew that he was likely thereby to cause an injury.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class.

Charge.—The charge should be stated as nearly as possible in the language of the section of the Act which is disobeyed[5]. The particular direction of the law should be specified[6]. The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did (*or omitted to do, as the case may be*) such conduct being contrary to the provisions of Act———, section ——, and known by you to be prejudicial to——, and thereby committed an offence punishable under s. 166 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

1 *Appaji Narayan,* (1895) Cr. R. No. 27 of 1895, Unrep. Cr. C. 764.
2 M. & M. 139.
3 *Viraswami Naick,* (1877) 1 Weir 72.
4 *Rangasami Nayudu,* (1910) 20 M. L. J. 568, 7 M. L. T. 429.
5 (1865) 2 W. R. (Cr. L.) 2.
6 *Karm Din,* (1890) P. R. No. 34 of 1890.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[1]

167. Whoever, being a public servant[1], and being, as such public servant, charged with the preparation or translation of any document[2], frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause[3], or knowing it to be likely that he may thereby cause, injury[4] to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant framing an incorrect document with intent to cause injury

COMMENT.

The preceding section dealt generally with the disobedience of any direction of law, this section deals with a specific instance, viz, that of framing an incorrect document with intent to cause injury This section is similar to s 218

1. **'Public servant'.**—See s 21, *supra*

2 **'Preparation or translation of any document'.**—'Making what purports to be a copy of a document is not included in the words 'preparation or translation of any document', nor in the words 'frames or translates that document'"[2]

As to the meaning of "document", see s 29, *supra*

Submitting a false report—Where an *amin*, who was entrusted with the [illegible]

section and was liable to be punished under it[3]

Incorrect copy of an entry.—The accused, a village *putwari*, prepared an incorrect copy of an entry in his *roznamaha* for a plaintiff in a civil suit The entry related to a contract between the plaintiff and another It was held that the accused had committed an offence under this section of framing an incorrect document[4]

3. **'Intending thereby to cause'.**—"Where an act, *in itself indifferent*, if done with a particular intent *becomes* criminal, *there* the *intent* must be *proved and found*. but where the act is in itself *unlawful*, the proof of justification or excuse lies on the *defendant* and, in failure thereof, the *law implies* criminal intent"[5].

4 **'Injury'.**—See s. 44, *supra*

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant

(2) That he had the charge of the preparation or the translation of the document

(3) [illegible] vant

(4) [illegible]

(5) [illegible] ming or trans lating the same

[illegible] P

[4] *Hira Sing* (1872) P R No 32 of 1872

[5] Per Lord Mansfield in *Woodfall*, (1770), 4 Burr 2661, 2667

(6) That he did as above, with intent, or with knowledge that it was likely that he would thereby cause injury.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

Separate convictions.—The offence of a public servant framing an incorrect document with intent to cause injury under this section is included in the offence of forging a document and using it as genuine under ss. 467 and 471 of the Code and a conviction both under the provisions of this section and ss. 467 and 471 is not maintainable[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being a public servant to wit——, and being, as such public servant, charged with the preparation (*or* translation) of the document relating to——, framed (*or* translated) that document in a manner which you knew (*or* believed) to be incorrect, intending thereby to cause (*or* knowing it to be likely that you might thereby cause) injury to——and that you thereby committed an offence punishable under s. 167 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—An official, however humble, who deliberately tampers with official records and issues false copies, whatever his motives may be, deserves severe punishment, not merely for his own conduct but as a deterrent to others who may be tempted to follow his example[2].

Public servant unlawfully engaging in trade.

168. Whoever, being a public servant[1], and being legally bound[2] as such public servant not to engage in trade, engages in trade[3], shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes those public servants only who are legally bound not to engage in trade. It is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required.

Public servants are not allowed to trade in order that they may not neglect their duties. Being in official position they could easily obtain unfair advantages over other traders.

1. **'Public servant'.**—See s. 21, *supra.*

2. **'Legally bound'.**—See s. 43, *supra.*

3. **'Engages in trade'.**—The Indian Penal Code contains no definition of the very general word 'trade,' and no explanation of the equally wide term 'engages in trade'. This section has been made the radix for a number of special enactments going to control the conduct of public servants in the matter of varied descriptions of traffic and money dealings[3].

A person engages in trade who habitually buys and sells with a view to profit. The word 'trade' does not include lending money at interest. Lending money at interest does not, therefore, amount to 'unlawfully engaging in trade'[4].

1 *Gulzari Lal*, (1926) 3 O. W. N. 760.
2 *Sukhnandan Lal*, (1926) 28 Cr. L. J. 31.
3 *Narayan*, (1910) 6 N. L. R. 114.
4 *Muhammada*, (1903) P. R. No. 22 of 1903.

There are various enactments prohibiting public officers from engaging in trade[1]

A Vice Chairman of a Municipal Board was vested with authority to make contracts for the construction of municipal works, and to pass the contractor's bills and issue cheques for the payment of the same out of municipal funds In pursuance of this authority, the Vice Chairman gave two contracts for the construction of municipal drains to L, a regular contractor with the Board L being without funds for the execution of the contracts, the Vice Chairman, who had a private money lending business, advanced money to L for that purpose, and subsequently passed L's bill and repaid himself from the realization of municipal cheques issued by him It was held that the Vice Chairman was guilty of an offence under this section[2] Where a police servant carried on a shop contrary to the prohibition contained in s 10 of the Police Act, he was held guilty under this section[3].

Statutory application.—See the Madras City Municipal Act (Mad Act IV of 1919), s 359, the City of Bombay Improvement Trust Transfer Act (Bom Act XVI of 1925), s 117.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant

(2) That he, as such, was legally bound not to engage in trade

(3) That he did engage in trade

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, being a public servant, to wit——, and being, as such public servant, legally bound not to engage in trade, did engage in trade, and thereby committed an offence punishable under s 168 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

1884), Bombay City Municipal Act (Bom Act III of 1888), Bombay City Municipalities Act (Bom Act XVIII of 1925), Bombay

Act IV of 188?), s 13; the Punjab

App I

[3] *Sagar Singh* (1917) 19 Cr L J

Public servant unlawfully buying or bidding for property.

169. Whoever, being a public servant[1], and being legally bound[2], as such public servant not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

COMMENT.

This section is merely an extension of the principle enunciated in the last section. It prohibits a public servant from purchasing, or bidding for property which he is legally bound not to purchase.

1. **'Public servant'.**—See s. 21, *supra*.

2. **'Legally bound'.**—See s. 43, *supra*. The public servant must be legally bound not to bid for property. Thus, where a Sub-Inspector was charged with having purchased a pony, which had been impounded, it was held that he should have been convicted under this section and s. 19 of Act I of 1871, and that he could not be convicted under s. 406 for criminal breach of trust[1].

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he, as such, was legally bound not to purchase or bid for the property in question.

(3) That he did purchase or bid for that property, either in his own name, or in the name of another, or jointly, or in shares with others.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department and being legally bound as such public servant not to purchase (*or* bid for) certain property, viz., ——, purchased (*or* bid for that property) in your name [(*or* in the name of——) *or* jointly or in shares with——] and thereby committed an offence punishable under s. 169 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Personating a public servant.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office[1], or falsely personates any other person holding such office[2], and in such assumed character does or attempts to do any act under colour of such office[3], shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

COMMENT.

Section 140 punishes the person who wears the garb or carries the token used by a soldier. This section punishes a person who does any act in the assumed character of a public servant.

1 *Rajkristo Biswas*, (1871) 16 W. R. (Cr.) 52.

Scope —' Section 170 does not make the act of pretending to hold a particular office as a public servant punishable, unless the person in such assumed character does, or attempts to do any act under colour of such office [1]

Ingredients —The section requires two things —

1 A person (*a*) pretending to hold a particular office as a public servant knowing that he does not hold such office, or (*b*) falsely personating any other person holding such office

2 Such person in such assumed character must do or attempt to do an act under colour of such office

1. 'Pretends to hold any particular office as a public servant, knowing that he does not hold such office —The particular office must be an existing office If it is uncertain who legally fills the office, a person doing an official act in pursuance of what he honestly believes to be his lawful title to the office, does not come within the section

As to the meaning of 'public servant', see s 21, *supra*

2 'Falsely personates any other person holding such office'.— 'Falsely' does not mean 'fraudulently' A fraudulent or dishonest intention is immaterial[2] ' To personate means to pretend to be a particular person [3]

3 'In such assumed character does or attempts to do any act under colour of such office' —It is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated[4] The accused was arrested when he was demanding one anna s worth of fruit from a fruit seller for one pice on the representation that he was a Head Constable, which in fact he was not It was held that if he pretended to be a police officer and as such police officer tried to extort money or things from a fruit-seller, he committed an offence under this section, and it was not necessary that the act done under colour of office should be a legal act on the part of the accused[5]

[illegible]

not sufficient Where the accused went to the platform of a railway station and obtained admission on a pretence that he was a C I D Officer without purchasing a platform ticket, it was held that his conviction under this section was wrong because the act of the accused did not assume an official authority[7] Where a person, pretending to be a police officer, reprimanded some villagers on account [illegible] con[illegible] the [illegible]ften [illegible]oints to acts which could not have been done without assuming official authority or responsibility, and would not connote acts of a ministerial or mechanical character, which might be done without requiring the justification of office in the person doing them[9] Where one *kulkarni* performed certain ministerial official duties in

1 Per Copleston J C in *Nga Pe*, (1896) [illegible]

[illegible]

B & O [illegible]

4 *A*[illegible] *ud-din*, (1904) 27 All 294

5 *Az*[illegible] *ud-din ibid*

6 M & M. 142

7 *Sukhdeo Pathak*, (1917) 3 P L J 389, 4 P L W 39

8 *Sadanund Doss*, (186[illegible]) 2 [illegible]

9 *Umakant Balvant* [illegible] 222 706

connection with a record on behalf of another, the offence under this section was not committed[1]. Where a Village Revenue Officer, in the absence of the Village Magistrate, exercised the powers of a Village Magistrate, and it was found that he acted in good faith, it was held that a conviction under this section could not be sustained[2].

PRACTICE.

Evidence.—Prove (1) that the accused personated some public servant; or that he pretended to hold the office of a public servant.

(2) That he was not a public servant; or that he did not hold such office.

(3) That he acted falsely in such personation; or that he knew that he did not hold such office.

(4) That he, when assuming such character, did or attempted to do something under colour of such office.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, pretended to hold the office of——, as a public servant (*or* falsely personated——holding such office), and in such assumed character did (*or* attempted to do)——under colour of such office and thereby committed an offence punishable under s. 170 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Wearing garb or carrying token used by public servant with fraudulent intent.

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that lass of public servants, shall be punished with imprisonment of ither description for a term which may extend to three months, r with fine which may extend to two hundred rupees, or with oth.

COMMENT.

Under this section the offence is complete, although no act is either done or empted to be done in the assumed official character. The mere circumstance of aring such a garb, or using such a token, with the intention or knowledge supposed ufficient. If any act is done then the preceding section will apply. The English is to the same effect. If a person at Oxford, who is not a member of the versity, go to a shop for the purpose of fraud, wearing a commoner's cap and n, and obtain goods, this appearing in a cap and gown is a sufficient false ence although nothing passes in words[3]. Under s. 140 the wearing of the garb rrying of the token of a soldier is made punishable.

Intention is the gist of the offence under this section. The intention must practise deception by wearing the garb or carrying the token of a public nt. Where the accused was found carrying a police jacket under his arm, with

akant Balvant, (1907) 9 Bom. L. R. 6.

[2] (1881) 1 Weir 74.

[3] *Barnard*, (1837) 7 C. & P. 784.

intent that it should be believed that he was a police constable, it was held that he committed no offence under this section as he was not wearing the jacket[1]

PRACTICE.

Evidence —Prove (1) that the accused wore the garb, or carri d the token in question

(2) That such garb or token resembled that of a public servant

(3) That the accused did not belong to the class of public servants, who use such garb or token

(4) That he did as in (1) with the intention, or with the knowledge, that it was likely that it might be believed he was such public servant

Procedure —Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily

Sentence —Where an accused person is convicted of wearing the garb of a Police Constable, and of personating by means of such garb a Police Constable, and as such ordering a person to be kept in custody, only one sentence ought to be passed on him under the provisions of s 71 of the Code[2].

[1] *Nga Po Kyaw* (1904) U B R. (P C) (1940 1906) 3

[2] *Tukaram* (1888) Unrep Cr C 405.

CHAPTER IX-A.

OF OFFENCES RELATING TO ELECTIONS.

"Candidate," "electoral right" defined.

171A. For the purposes of this Chapter—

(*a*) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat; provided that he is subsequently nominated as a candidate at such election;

(*b*) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election[1].

COMMENT.

This Chapter has been introduced in the Code by the Indian Election Offences and Inquiries Act (XXXIX of 1920) to give effect to the recommendations of the Joint Select Committee appointed to report on the Government of India Act. In their report they observed :"The Committee are themselves firmly convinced that a complete and stringent Corrupt Practices Act should be brought into operation before the first election for the Legislative Councils. There is no such Act at present in existence in India, and the Committee are convinced that it will not be less required in India than it is in other countries". Act XXXIX of 1920 was, therefore, enacted to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act.

The Government of India thought it desirable that advantage should be taken of this opportunity to make election offences part of the general law of the and, not only in respect of Legislative bodies, but also in the case of election to ublic bodies generally.

The Select Committee to which the Indian Elections Offences and Inquiries ill was referred, in their Report, observed : "We feel there are distinct advantages , the present time when election is to play so important a part in the new public e of India that the public conscience should be markedly drawn to the danger of rupt practices in relation to the franchise, whether that franchise relates to islative or other bodies. We feel it is of the greatest importance that the nciple of the purity of the franchise should be insisted on in the general criminal of the country and that it should not be left to local legislatures to deal with broad principles enacted in Part I of the Bill. There will be sufficient scope hose bodies in elaborating and supplementing the law as proposed in the Bill ve recognize that it is by no means exhaustive. Experience may no doubt that minor offences will require to be provided against and that local cons may need local treatment. We feel, however, that to lay down the broad of a law so necessary to protect the purity of the franchise is an appropriate f work for the Imperial Legislative Council"[1].

The present chapter, therefore, "seeks to make punishable under the ordinary aw, bribery, undue influence, and personation and certain other malpractices

[1] G. I. 1920, Part V, p. 178.

at elections not only to the Legislative bodies, but also to membership of public authorities where the law prescribes a method of election, and, further, to debar persons guilty of such malpractices from holding positions of public responsibility for a specific period [1]

The new offences that are thus inserted in the Penal Code are bribery, undue influence personation and deliberate false statements with the object of prejudicing a candidate at or in connection with elections[2]

1. **'Election'**—'Election' is defined as including election to all classes of public bodies where such a system is prescribed by law (*vide* Explanation 3 to s 21, *supra*)

Bribery

171B (*1*) Whoever—

(*i*) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right, or

(*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section

(*2*) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(*3*) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward

COMMENT.

This section defines the offence of bribery at an election

'Bribery' is defined primarily as the giving or acceptance of a gratification either as a motive or as a reward to any person, either to induce him to stand as, or not to stand as, or to withdraw from being a candidate, or to vote or refrain from voting at an election It also includes offers or agreements to give or offers and attempts to procure a gratification for any person Gratification is already explained in s 161 and is not restricted to pecuniary gratifications or to gratification estimable in money[3]

Sub-clause (2)—**'Offers'**—By this clause the attempt to corrupt is made equivalent to the complete act

Treating—Treating will be bribery if refreshment is given or accepted with the intent required by law[4] Treating of non electors in order that they

1 See the Statement of Objects and Reasons, G I 1920, Part V, p 135, s. 4.

2 *Ibid*, s 7

3 *Ibid*, s. 8.

4 *Ibid*

might influence voters[1] or of women in order that they might influence their fathers or brothers would be illegal[2].

The gist of the offence of treating is the corrupt inducement to the voter to vote or refrain from voting, which may be given at any time, although for obvious reasons it is usually given at or shortly before the election. Thus it has been held that the seat may be avoided for acts of treating done in July, though the dissolution did not take place till August[3].

CASES.

Where the respondent stood drinks to all the members of a political club who were present three years before the election, this was held not to be treating, partly on account of the length of time between it and the election[4].

Where the sitting member, after the election, treated a number of people (who met him on his leaving the borough to congratulate him) with whisky, but it was shown that he did not know whether they were voters or not, and in fact only two of them were, the election was not avoided[5].

Where refreshment was strictly confined to those who were actually engaged in the work of the election, and were known supporters of the sitting member, his committee men in fact, the election was upheld[6].

Where refreshment was provided on the polling day by the sitting member's agent, but no one, as it appeared, partook of it, except those who had come with the express object of voting for him, nor was there any previous announcement that such refreshment would be provided, nor anything said to the voters, at the time they got the refreshment, the election was not avoided[7].

Where the respondent gave an entertainment in the month of October 1905 which all persons in the borough were invited to attend by an advertisement in a local paper, and printed handbills inviting all the friends of the candidate to attend and meet the retiring member, and stating that there would be a band and tea, coffee, and refreshtments, and two dozen of whisky were provided after the 'At Home' began with the candidate's consent, the election taking place in the following January, it was held that there was no corrupt intention, and therefore the respondent was not guilty of treating[8].

Where, however, a garden party was given in September 1905, at the country seat of the respondent's father, nominally by a political social council, at which refreshments were provided on a lavish scale, and political speeches were made, this was held to be treating by an agent, the election taking place in January 1906[9].

Where a philanthropic society was started, of which the respondent was president, and in time of distress a large number of tickets, many of which bore the respondent's name, were given away, which entitled the possessors to food or coals, and the respondent alluded to such distribution in his speeches, this was held not to be bribery or cheating, but the Judges expressed an opinion that it might be, if the giving of the tickets were coupled with a request for the individual's vote, or if the tickets were given dishonestly and colourably on a large scale, although there were no selection of voters only, and even if a large proportion of the recipients were non-voters, and that in the latter case it would probably amount to bribery or treating at common law[10].

1 *Longford*, (1870) 2 O'M. & H. 6, 15.
2 *Tamworth*, (1869) 1 O'M. & H. 75, 86.
3 *Youghal*, (1869) 1 O'M. & H. 291, 21 L. T. 316.
4 *St. George's Division Case*, (1896) 5 O'M. & H. 89, 100.
5 *Carrickfergus*, (1869) 1 O'M. & H. 264, 265.
6 *Bradford*, (1869) 1 O'M. & H. 39.
7 *Carrickfergus*, sup., p. 268.
8 *Great Yarmouth*, (1906) 5 O'M & H. 176, 196.
9 *The Bodmin Election Petition*, (1906). *The Times*, June 12th.
10 *St. George's Division Case*, sup.; *Wigan*, (1881) 4 O'M & H. 1, 13, per Bowen, J.

A conversazione though given in the name of a political association was to be paid for by the respondent and refreshments were to be obtained by producing a ticket which cost three pence It was proved that the refreshments could not have been supplied for the amount which was charged The Court held that the refreshments were supplied in an excessive quantity to influence voters in favour of the respondent and avoided the election for treating by agents but acquitted the respondent of personal treating[1]

The giving of drink to those present at meetings of political associations even before the electoral campaign has begun is most dangerous[2]

Smoking concerts are objectionable as affording an opportunity of treating[3]

171C (*1*) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election

Undue influence at elections

(*2*) Without prejudice to the generality of the provisions of sub section (*1*), whoever—

(*a*) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind or

(*b*) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub section (*1*)

(*3*) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right shall not be deemed to be interference within the meaning of this section

COMMENT

This section defines undue influence at elections The offence is punishable under s 171 F

Undue influence at an election is defined as the voluntary interference or attempted interference with the right of any person to stand or not to stand or withdraw from being a candidate or to vote or refrain from voting This covers all threats of injury to person or property and all illegal methods of persuasion and any interference with the liberty of the candidates or the electors A sub section is added to explain that the inducing or attempting to induce a person to believe that he will become the object of Divine displeasure is also interference It is not however interference within the meaning of the clause to make a declaration of public policy or a promise of public action [4]

Where an attempt or threat is proved it is unnecessary to prove that any person was in fact prevented from voting because the offence is complete

'Injury'—See s 44 *supra*

[1] *Rochester* (1892) 4 O M & H 159 Day s El Cas 99
[2] *Rochester* sup
[3] *Worcester* (1892) Day s El Cas 85 88
[4] Statement of Objects 1920 Part V p 135 s.

CASES.

On the night preceding the day of an election the complainant, a candidate, was prevented from coming out of his house to canvass for votes by his rival candidate and others who were picketing the complainant's house. It was held that the accused had not interfered or attempted to interfere with the free exercise of an electoral right or threatened any candidate or voter with injury, and no *prima facie* case under this section was made out[1].

English cases.—Where it was proved that an agent for the sitting member, who was a large employer of labour, first extracted a promise from his men not to vote at all, and subsequently threatened that if they voted for L, they should have no further employment from him, the election was avoided, although some of the men so threatened left of their own accord previously to the election[2].

One H, one of the respondent's principal agents, and chairman of one of the district committees at the election, who was a Justice of the Peace, and a trustee of several charities, and a very influential person in the borough, stood with his gardener, J. M., just outside one of the polling stations, and spoke to many of the voters as they came to the poll, and solicited one voter, who was wearing the petitioner's colours, to vote for the respondent. When another voter wearing the petitioner's colours was coming out of the polling station, J. M. called out, "We shall know him and remember him another day". It was held that though this conduct was highly improper, yet it did not amount by itself to undue influence so as to avoid the election[3].

Where undue influence by the improper exercise of spiritual influence was proved to have been committed by agents of the respondents, the elections were avoided. In this case it appeared that a pastoral had been issued by the Catholic bishop to the clergy throughout certain constituencies, and was read by them from the altar a few days before the election. The pastoral denounced the political party to which the petitioners belonged, condemned their principles as unlawful and unholy, and threatened with spiritual injury and loss all persons who should vote for them[4].

Personation at elections.

171D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper[1] in his own name:

and whoever abets, procures or attempts to procure the voting by any person in any such way[2], commits the offence of personation at an election.

COMMENT.

This section defines 'personation at elections'. The offence is punishable under s. 171 F.

The definition of 'personation' closely follows the definition in s. 24 of the Ballot Act, 1872, and covers both a person who attempts to vote in another person's name, or in a fictitious name, a voter who attempts to vote twice and any person who abets, procures or attempts to procure such voting[5].

1 *Ram Saran Das*, (1926) 7 Lah. 218.
2 *Westbury*, (1869) 1 O'M. & H. 47, 50.
3 *Lichfield*, (1880) 3 O'M. & H. 136.
4 *North Meath*, (1892) 4 O'M. & H. 130, 185, Day's El. Cas. 132, 141.
5 Statement of Objects and Reasons, G. I., 1920, Part V, p. 135, s. 10.

1. **'Having voted once . applies at the same election for a voting paper'.**—The offence of double voting can be charged not only under this section but also under s 55 (1) of the Madras District Municipalities Act (Mad Act V of 1920)[1] It will be punishable also under similar provisions of the District Municipal Acts of other provinces

'Whoever abets the voting by any person in any such way'.—

the name of another

l time[2] If at an

election a man applies to the presiding in a name other than his name of origin, or in the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote and if he does so he is not guilty of personation[3]

thod of voting at an election was for the voter

signature slips and ece of paper bearing a

The name L appeared in the electoral roll against that number and the applicant professed to be L A *patwari* pointed out that the applicant was not L but was one M After some dispute the applicant admitted that he was not L It was held that the applicant was not guilty of an attempt to commit the offence of fraudulently applying for a voting paper and thereby personating at an election[4] The Court observed "In this case was an act which by itself would not have a paper The applicant was frustrated in he had not been frustrated, all that he ig of a signature slip on false pretences The completion of this act would not have amounted to a completion of the act of applying for a voting paper"[5]

The applicant was accused of having abetted the personation of a voter at a municipal election in that, not being himself acquainted with the person who came forward to vote, he had, on the advice of others, put his name to a "signature sheet" in token that the thumb-mark made by the voter was that of the person entitled to vote under a certain name on the electoral roll It was held that, in asmuch as the acts done by the applicant constituted the specific offence provided for by this section, he could only be tried for that offence, and could not be tried for abetment of the general offence provided for by s. 465 of the Code[6]

Where the accused, a candidate at a Municipal election, was *not* aware of the fact that a certain voter was falsely personating one H and the accused did not profess to attest on his personal knowledge the voting paper of the voter, and where the polling officer also was aware of the fact that the accused was not attesting sed was not guilty of intentionally

of FM was recorded as a 's name was A asked for a

his father's name was M who prepared the electoral MD son of FM had no existence the offence of personation[8]

1 *Shesha Ayyar*, [1924] M W N 268
2 *Ram Nath*, (1925) 24 A L J 180, 184
3 *Fox*, (1887) 16 Cox 166
4 *Malkhan Singh*, (1924) 22 A L J. 1102.
5 *Ibid*
6 *Ram Nath*, (1924) 47 All 268
7 *Ram Nath*, (1925) 24 A L J 180
8 *Muhammad Din*, (1923) 117 I. C. 833.

CASES.

On the night preceding the day of an election the complainant, a candidate, was prevented from coming out of his house to canvass for votes by his rival candidate and others who were picketing the complainant's house. It was held that the accused had not interfered or attempted to interfere with the free exercise of an electoral right or threatened any candidate or voter with injury, and no *prima facie* case under this section was made out[1].

English cases.—Where it was proved that an agent for the sitting member, who was a large employer of labour, first extracted a promise from his men not to vote at all, and subsequently threatened that if they voted for L, they should have no further employment from him, the election was avoided, although some of the men so threatened left of their own accord previously to the election[2].

One H, one of the respondent's principal agents, and chairman of one of the district committees at the election, who was a Justice of the Peace, and a trustee of several charities, and a very influential person in the borough, stood with his gardener, J. M., just outside one of the polling stations, and spoke to many of the voters as they came to the poll, and solicited one voter, who was wearing the petitioner's colours, to vote for the respondent. When another voter wearing the petitioner's colours was coming out of the polling station, J. M. called out, "We shall know him and remember him another day". It was held that though this conduct was highly improper, yet it did not amount by itself to undue influence so as to avoid the election[3].

Where undue influence by the improper exercise of spiritual influence was proved to have been committed by agents of the respondents, the elections were avoided. In this case it appeared that a pastoral had been issued by the Catholic bishop to the clergy throughout certain constituencies, and was read by them from the altar a few days before the election. The pastoral denounced the political party to which the petitioners belonged, condemned their principles as unlawful and unholy, and threatened with spiritual injury and loss all persons who should vote for them[4].

Personation at elections.

171D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper[1] in his own name:

and whoever abets, procures or attempts to procure the voting by any person in any such way[2], commits the offence of personation at an election.

COMMENT.

This section defines 'personation at elections'. The offence is punishable under s. 171 F.

The definition of 'personation' closely follows the definition in s. 24 of the Ballot Act, 1872, and covers both a person who attempts to vote in another person's name, or in a fictitious name, a voter who attempts to vote twice and any person who abets, procures or attempts to procure such voting[5].

1 *Ram Saran Das*, (1926) 7 Lah. 218.
2 *Westbury*, (1869) 1 O'M. & H. 47, 50.
3 *Lichfield*, (1880) 3 O'M. & H. 136.
4 *North Meath*, (1892) 4 O'M. & H. 130, 185, Day's El. Cas. 132, 141.
5 Statement of Objects and Reasons, G. I 1920, Part V, p. 135, s. 10.

[illegible]

171E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Punishment for bribery.

Provided that bribery by treating shall be punished with fine only.

Explanation:—'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

COMMENT.

This section specifies the punishment which should be inflicted for the offence of bribery. Bribery by treating is punishable with fine only.

PRACTICE.

Evidence.—Prove, where the accused is the giver of the bribe, that he gave gratification to a person with the object of (*a*) inducing him or any other person to exercise any electoral right, or (*b*) of rewarding any person for having exercised any such right.

Prove, where the accused is the acceptor of the bribe, that he accepted either for himself or for any other person any gratification as a reward (*a*) for exercising any electoral right, or (*b*) for inducing or attempting to induce any other person to exercise any such right.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

(Where accused is the giver of the bribe).

That you, on or about the——day of——, at——, gave a gratification, to wit——, to——with the object of [inducing him *or*——to exercise his electoral right] [*or* rewarding——for having exercised his electoral right] and thereby mmitted an offence under s. 171 E of the Indian Penal Code and within my izance.

(Where accused is the acceptor of the bribe.)

That you accepted for yourself or for——a gratification, to wit——, as a reward [for exercising your *or* his electoral right] *or* [for inducing or attempting to induce——*to exercise his electoral right.*]

And I hereby direct that you be tried on the said charge.

171F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for undue influence or personation at an election.

COMMENT.

This section specifies the nishment for undue influence at an election (s. 171 C) or personation at an e 171 D.)

1 Criminal Procedure Code, s. 1 . N. 122. *swami Thevar,* (1921) 15 L. W. 199,

PRACTICE.

Evidence.—Prove (1) that the accused voluntarily interfered or attempted to interfere with the free exercise of any electoral right; or

(2) that the accused threatened any candidate or voter or any person in whom a candidate or voter is interested, with injury of any kind; or

(3) that the accused induced or attempted to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure.

In the case of personation at an election prove (1) that the accused at an election applied for a voting paper or voted in the name of any other person, whether living or dead, or in a fictitious name; or

(2) that the accused having voted once at an election applied at the same election for a voting paper in his own name; or

(3) that the accused abetted, procured, or attempted to procure, the voting by any person in any one of the above ways.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section[1]. If the act of the accused is punishable under this section sanction of the local Government is necessary. For want of sanction he cannot be tried under s. 4[illegible].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily interfered (or attempted to interfere) with the free exercise of an electoral right to wit—[or threatened—, a candidate (*or* voter *or* in whom a candidate (or voter) to wit—is interested) with injury, to wit—] or [induced (*or* attempted to induce)—a candidate (or voter) at an election, to wit—, to believe that he or any person in whom he is interested, to wit—will become an object of Divine displeasure (*or* of spiritual censure)] and thereby committed an offence punishable under s. 171 F of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

The charge for the offence of personation at an election should run as thus —

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows.—

That you, on or about the——day of——, at the election, to wit—, applied for a voting paper (or voted) [in the name of another person to wit—, who is living (or dead)] [or in a fictitious name to wit—] [*or* in your name after having voted once at the said election] and thereby committed an offence punishable under s. 171 F of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Where the offence falls within the second paragraph [illegible]
shall be substituted in place of the second paragraph in [illegible]

That you, on or about the——day of——, at the [illegible]
(or procured or attempted to procure) the voting by [illegible]
and which is punishable *under the first para.* of s. [illegible]
an offence punishable under s. 171 F of the Indi[illegible]
cognizance [illegible]

[1] Criminal Procedure Code, s. 196.

171E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Punishment for bribery.

Provided that bribery by treating shall be punished with fine only.

Explanation:—'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

COMMENT.

This section specifies the punishment which should be inflicted for the offence of bribery. Bribery by treating is punishable with fine only.

PRACTICE.

Evidence.—Prove, where the accused is the giver of the bribe, that he gave gratification to a person with the object of (*a*) inducing him or any other person to exercise any electoral right, or (*b*) of rewarding any person for having exercised any such right.

Prove, where the accused is the acceptor of the bribe, that he accepted either for himself or for any other person any gratification as a reward (*a*) for exercising any electoral right, or (*b*) for inducing or attempting to induce any other person to exercise any such right.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

(Where accused is the giver of the bribe).

That you, on or about the——day of——, at——, gave a gratification, to wit——, to——with the object of [inducing him *or*——to exercise his electoral right] [*or* rewarding——for having exercised his electoral right] and thereby committed an offence under s. 171 E of the Indian Penal Code and within my cognizance.

(Where accused is the acceptor of the bribe.)

That you accepted for yourself or for——a gratification, to wit——, as a reward [for exercising your *or* his electoral right] *or* [for inducing or attempting to induce——to exercise his electoral right.]

And I hereby direct that you be tried on the said charge.

171F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for undue influence or personation at an election.

COMMENT.

This section specifies the punishment for undue influence at an election (s. 171 C) or personation at an election (s. 171 D.)

[1] Criminal Procedure Code, s. 196; *Ponnuswami Thevar*, (1921) 15 L. W. 199, [1922] M. W. N. 122.

PRACTICE

Evidence —Prove (1) that the accused incurred or authorized expenses on account of the holding of any public meeting or upon any advertisement circular or publication or in any other way

(2) That he did so for the purpose of promoting or procuring the election of a candidate

(3) That he incurred or authorized the said expenses without the general or special authority in writing of the candidate

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency or first class

Sanction —Previous sanction is necessary for prosecution under this section[1]

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you without the general (*or* special) authority in writing of——incurred (*or* authorized) expenses on account of the holding of a public meeting at—(*or* upon any advertisement circular *or* publication Exhibit— *or* in any other way whatsoever) for the purpose of promoting (*or* procuring) the election of—and thereby committed an offence punishable under s 171H of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

171I Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees

Failure to keep election accounts

COMMENT

This section punishes failure to keep accounts of expenses incurred in connection with an election if such accounts are required to be kept by any law or rule having the force of law

PRACTICE

Evidence —Prove (1) that the accused was required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election

(2) That he failed to keep such acco

Procedure —Not dable—
Triable by Magistrate T

Sanction —Sanction

Charge —I (*name and*
accused) as follows —

That you being req
any rule having the force o
at (*or* in connection with) tl
thereby committed an
and within my cognizance

And I hereby

[1] Criminal Procedure

171G. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

False statement in connection with an election.

COMMENT.

False statements of fact in relation to the personal character or conduct of a candidate are penalized by this section which corresponds to s. 1 of the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vic., c. 40).

PRACTICE.

Evidence.—Prove (1) that the accused made or published any statement in relation to the personal character or conduct of a candidate.

(2) That such statement was false and the accused either knew or believed it to be false or did not believe it to be true.

(3) That the accused made or published such statement with intent to affect the result of an election.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the ——day of——, at——, with intent to affect the result of the election, to wit—, made (*or* published) a statement in relation to the personal character (*or* conduct) of a candidate, to wit—, which statement is false and which you knew (*or* believed) to be false (*or* which you did not believe to be true) and thereby committed an offence punishable under s. 171 G of the Indian Penal Code.

And I hereby direct that you be tried on the said charge.

171H. Whoever without the general or special authority in writing of a candidate, incurs or authorizes expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Illegal payments in connection with an election.

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

COMMENT.

This section makes it illegal for any one, unless authorized by a candidate, to incur any expenses in connection with the promotion of the candidate's election.

1 Criminal Procedure Code, s. 196.

Refusal to accept a notice, abusing the process server and walking inside the house does not amount to absconding[1]

'In order to avoid'.—"The absconding must be with a purpose This implies that the absconder knows, or at least has reason to believe, the process has issued He may abscond to avoid the issue of process, and this would not be an offence punishable under s 172 When he knows, or has reason to believe, that it has issued, he may be unwilling to show contempt of the authority of the Court or officer who has issued it, and may comply with it, or so conduct himself that service may be effected , but he can hardly be said to be guilty of contempt of authority if he does not know, and has not reason to believe, the authority has been exercised, nor to be absconding to prevent the service of a process, if he does not know, nor has reason to believe, that it has issued' [2]

'Summons, notice or order'.—For the service of 'summons' see ss 69 74, Criminal Procedure Code A warrant addressed to a police officer is not a 'summons, notice or order [3], nor a warrant addressed to a Nazir by a civil Court for the arrest of a defendant in execution of a decree[4] Because from the wording of the section it appears that 'the summons, notice or order' therein referred to should be addressed to the same person whose attendance is required and who absconds to avoid being served with such 'summons, notice or order' A warrant is not an order served on an accused, it is simply an order to the police to arrest him[5] This section does not cover the absconding from a warrant of arrest[6] But this section is held applicable to witnesses who abscond to evade the service of a warrant issued by a Magistrate under ss 181 to 196 of the Criminal Procedure Code[7] This section was also held applicable where the accused who was placed in charge of certain attached property did not produce it for sale and evaded the service of notice to produce it[8]

2. 'Proceeding from a public servant legally competent to issue such summons etc.'—The liability of the accused depends upon the legal competence of the officer to issue the 'summons, etc'[9]

3. 'If the summons, etc , is to attend'.—This shows that existence of a summons, notice or order is necessary to constitute the offence It is not sufficient to show that a person apprehending that a process will be issued has absconded He may do so in the hope that his absence will deter the Court or officer from issuing the process, and he would not be guilty of an offence under this section

See s 20, *supra*, as to the meaning of 'Court of Justice'

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order

(2) That the same was issued by a public servant

(3) That such public servant was legally competent as such to issue it

(4) That such process was issued in order to be served on the accused

(5) That the accused absconded in order to avoid being served with such process

1 *Bhujang*, (1924) 1 O W N 150

2 [illegible]

Hira Lal (1883) 3 A W N 222

5 *Lakshmi*, (1881) Unrep Cr C 152 Cr R No 21 of 1881

6 *Sheo Jangal Prasad* (1928) 50 All. 666

7 *Hossein Manjee*, (1868) 9 W R (Cr) 70

8 *Harnam Singh*, (1918) 16 A L J 600

9 *Purshottam Valji*, (1868) 5 B H C (Cr C) 33

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

THIS Chapter contains those penal provisions which are intended to enforce obedience to the lawful authority of public servants. Contempts of the lawful authority of Courts of Justice, of officers of Revenue, of officers of Police, and of other public servants are punishable under this head. The penalties prescribed in this Chapter for particular offences obstructive of judicial proceedings must not be taken to interfere with other powers possessed by Courts of Justice and public functionaries to enforce their orders. They will not affect other coercive powers of the Courts of Justice to compel performance of their orders and decrees, whether by attachment and sale of property, by imprisonment or otherwise[1].

Absconding to avoid service of summons or other proceeding.

172. Whoever absconds in order to avoid being served with a summons, notice or order[1] proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order[2], shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice[3], with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Object.—*The object of this section is to punish an offender for the contempt* his conduct indicates of the authority whose process he disregards. The absconding must be with the intention of evading service.

Scope.—This section punishes the evasion of those orders which become binding from the moment they are served. It does not apply to orders which become binding without any kind of special service.

The second clause applies where the summons, notice or order is (1) for attendance in Court; or (2) for production of a document.

Ingredients.—The section requires two things:—

1. Absconding in order to avoid being served with a summons, notice or order.

2. Such summons, notice or order must proceed from a public servant legally competent to issue it.

1. 'Absconds in order to avoid being served with a summons, notice or order'.—"The term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has issued, he absconds"[2].

1 M. & M. 143.

2 Per Turner, C. J., in *Madapusi Srinivasa Ayyangar*, (1881) 4 Mad. 393, 397.

service of a summons The words prevents the serving on himself are not applicable to a case where the summons is tendered and refused inasmuch as tendering is in itself good service Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under this section[1] A person who gets away from the serving officer and shuts himself in his house is intentionally perventing service either by tender or by delivery within the meaning of this section[2]

Refusal to serve as special constable —In a case of dispute regarding the right to the possession of an estate between two parties one of whom was

quashed[3]

PRACTICE

Evidence —Prove (1) that the process in question was a summons notice or order or a direction for a proclamation

(2) Tl

to issue sucl

such proclan

(3)

the accused or upon some one else or that such summons notice or order had been or was to be lawfully affixed to some place or that such proclamation was about to be made

(4) That the accused prevented such service of the summons notice or order or that he prevented the affixing of such process or that he removed the same when so affixed or that he prevented the making of such proclamation

(5) That the accused did as above intentionally

For the second clause of the section prove further—

(6) That the process or proclamation required the attendance of the accused (either in person or by agent) or the production of a document and

(7) That such process or proclamation was to attend or to produce the document in a Court of Justice

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency first or second class—Triable summarily

Complaint —Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required[4]

Non attendance in obedience to an order from public servant

174 Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons notice order or proclamation proceeding from any public servant[1] legally competent as such public servant", to issue the same,

[1] See *Sahdeo Rai* (1918) 40 All 57— *Bahadura* (1925) 24 A L J 215

[2] *Budhna* (1927) 26 A L J 107

[3] *Gopinath Paryah* (1886) 10 C W N 8—

2 C L J 555

[4] Criminal Procedure Code s 195 See ss 4 6 78 487

For the second clause of the section prove further—

(6) That the process required the attendance of the accused (either personally or by his agent) or required the production of a document by him (either personally or by his agent).

(7) That such attendance or production was to be in a Court of Justice.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[1].

Preventing service of summons or other proceeding, or preventing publication thereof.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundreds rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section punishes intentional prevention of the service of summons, notice or order. What is required is some act of opposition offered to the officer serving the summons[2]. A refusal to sign a summons[3], a refusal to receive a summons[4], throwing down of a summons after service[5], a refusal to accept a citation issued under s. 147 of the Land Revenue Act (U. P. Act III of 1901) or to sign the duplicate thereof[6], and a refusal to take *subpœna* under s. 160 of the Criminal Procedure Code[7], do not to constitute the offence of intentionally preventing the

[1] Criminal Procedure Code, s. 195. See also ss. 476-479, 487.

[2] *Uthudamawara*, (1923) 1 Ran. 49.

[3] *Kalya bin Fakir*, (1868) 5 B. H. C. (Cr. C.) 31; *Khushal*, (1869) Cr. R. for 1869, Unrep. Cr. C. 17; *Bhoobuneshuar Dutt*, (1877) 3 Cal. 621; *Krishna Gobinda Das*, (1892) 20 Cal. 358.

[4] *Penamalai Nadan*, (1882) 5 Mad. 199; *Ananta Kernaya*, (1884) 1 Weir 80; *Zapantis*, (1920) 3 U. B. R. 202; *Uthudamawara*, sup.; *Debigir Tapdhari*, (1924) 23 A. L. J. 148; *Banwari*, (1925) 24 A. L. J. 216.

[5] *Arumuga Nadan*, (1881) 5 Mad. 200 (*n*), 1 Weir 79.

[6] *Ahmad Hussain Khan*, (1909) 31 All. 608.

[7] *Chandika Prasad*, (1918) 21 O. C. 150.

under this section[1] Disobedience to a summons, directing a person to appear at such place in camp as the Magistrate might be on the date fixed, is not punishable[2] A verbal order not specifying the particular day on which a person is to appear is not a lawful order[3]

The place where a person is summoned to attend must be in British India It is not, therefore, an offence to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside the British territory[4]

'Summons'.—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned[5] It must be one which could lawfully be issued[6], hence, a summons to take away a bundle of leases for distribution is not such a summons[7]

Where a summons was not sealed as required by Madras Act III of 1869, s 2, under which it was issued, a conviction was held to be bad[8]

The issue of a citation to an alleged defaulter under s 147 of the United Provinces Land Revenue Act 1901 does not involve him in any legal liability to attend, and non compliance with it does not render him guilty of an offence under this section[9] The Oudh Chief Court has differed from this view[10]

'Order'.—A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under this section[11] The order should be directed or addressed to the accused[12]

Order to attend necessary.—A Munsif called upon a Vakil to show cause why a report should not be made against him to the High Court for gross professional misconduct The Vakil put in a written explanation and the matter was ordered to be put up on a certain date for orders On the day fixed he did not appear and a proceeding was drawn up for his prosecution It was held that as there was no order enjoining upon the Vakil to appear personally before the Munsif the proceeding should be quashed[13]

In the absence of an order in writing as required by s 160 Criminal Procedure Code, a person who is asked orally to appear before a police officer as a witness does not commit an offence under this section for non appearance[14]

'Public servant'.—See s 21, *supra* A receiver appointed under the Land Registration Act (Beng Act VII of 1876, s 56) is not a public servant within the meaning of this section[15]

2 **'Legally competent, as such public servant'.**—The public servant must be legally competent to issue summons etc If he is not legally competent to issue the summons, notice or order in virtue of which the attendance of the accused

[1] *Ram Saran* (1882) 5 All 7, *Bholanath* (1883) 3 A W N 109, *Hira Lal* (1890) 10 A [illegible] 536 (18[illegible] R [illegible]

[2] *Jaswant* (1877) Colm D Cr No 89

[3] (1870) 6 M H C App 10

[4] *Paranga*, (1893) 16 Mad 463 See *Ram* [illegible] (1883) 1 Weir 93

[8] [illegible] 1890 1 W [illegible] 100 [illegible] 7 M H C App 3

[12] *Firkha* (1870) P R No 6 of 1870

[13] *Prokash Chunder Sarkar*, (1903) 7 C W N 797

[14] *Virasami Pillai*, (1895) 1 Weir 86

[15] *Ebrahim Sircar*, (1901) 29 Cal 236

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart[3],

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(*a*) A being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(*b*) A being legally bound to appear before a Zila Judge, as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

COMMENT.

The offence contemplated by this section is an omission to appear at a particular time and at a particular place before a specified public functionary in obedience to a summons, notice, or order, not defective in form.

Ingredients.—The section requires three essentials—

1. A person must be legally bound to attend at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from a public servant.

2. The public servant must be legally competent to issue such summons, etc.

3. The person summoned must have (*a*) intentionally omitted to attend at that place or time, or (*b*) departed from the place where he was bound to attend before the time at which it was lawful for him to depart.

1. 'Legally bound to attend in person...at a certain place and time *in obedience to a summons, etc.,* proceeding from a *public servant legally* competent...to issue the same'.—A conviction cannot be had unless the person summoned was legally bound to attend, and refused or intentionally omitted to attend[1]. Where the presence of a person cannot be compelled, refusal to appear does not amount to an offence under this section. Thus where the presence of a tout could not be compelled under s. 36 of the Legal Practitioners' Act to show cause or to receive orders in the case, it was held that no offence under this section was committed[2].

'Certain place and time'.—It must be proved that he had notice to appear at a certain time and place and omitted to do so[3]. Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, it was held that such person could not be punished

1 *Sreenath Ghose*, (1868) 10 W. R. (Cr.) 33; *Sittu Padayachi*, (1897) 1 Weir 81; *Tajumaddi Lahory*, (1868) 1 Beng. L. R. (A. Cr. J.) 1; *Khota Ram*, (1907) P. L. R. No. 37 of 1907.

2 *P. J. Money*, (1928) 6 Ran. 529.

3 *Shib Pershad Chuckerbutty*, (1872) 17 W. R. (Cr.) 38; *Murad*, (1920) 2 L. L. J. 539.

under this section[1] Disobedience to a summons, directing a person to appear at such place in camp as the Magistrate might be on the date fixed, is not punishable[2] A verbal order not specifying the particular day on which a person is to appear is not a lawful order[3]

The place where a person is summoned to attend must be in British India. [illegible] h Magistrate [illegible] the British [illegible]

'Summons'.—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned[5] It must be one which could lawfully be issued[6], hence a summons to take away a bundle of leases for distribution is not such a summons[7]

Where a summons was not sealed as required by Madras Act III of 1869, s 2, under which it was issued, a conviction was held to be bad[8]

The issue of a citation to an alleged defaulter under s 147 of the United Provinces Land Revenue Act 1901 does not involve him in any legal liability to attend, and non compliance with it does not render him guilty of an offence under this section[9] The Oudh Chief Court has differed from this view[10]

'Order'.—A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under this section[11] The order should be directed or addressed to the accused[12]

Order to attend necessary.—A Munsif called upon a Vakil to show cause why a report should not be made against him to the High Court for gross professional misconduct The Vakil put in a written explanation and the matter was ordered to be put up on a certain date for orders On the day fixed he did not appear and a proceeding was drawn up for his prosecution It was held that as there was no order enjoining upon the Vakil to appear personally before the Munsif the proceeding should be quashed[13]

In the absence of an order in writing as required by s 160 Criminal Procedure Code, a person who is asked orally to appear before a police officer as a witness does not commit an offence under this section for non appearance[14]

'Public servant'.—See s 21, *supra* A receiver appointed under the Land Registration Act (Beng Act VII of 1876, s 56) is not a public servant within the meaning of this section[15].

2. **'Legally competent, as such public servant'**.—The public servant must be legally competent to issue summons etc If he is not legally competent to issue the summons, notice or order in virtue of which the attendance of the accused

1 *Ram Saran*, (1882) 5 All 7, *Bholanath*, (1883) 3 A W N 109, *Hira Lal* (1890) 10 A [illegible] 536 (18 [illegible] R [illegible]

2 *Jaswant* (1877) Colm D Cr No 89

3 (1870) 6 M. H C App 10

4 *Paranga*, (1893) 16 Mad 463. See *Ram* [illegible]

[illegible] 5 M H. C App 15, (1870) 1 Weir 87, (1872) 7 M H C App 3

12 *Firkha* (1870) P R No 6 of 1870

13 *Prokash Chunder Sarkar*, (1903) 7 C W N 797

14 *Virasami Pillai*, (1893) 1 Weir 86

15 *Ebrahim Sircar*, (1901) 29 Cal 236

is required, no offence is committed[1]. Disobedience to a summons issued by a Village Magistrate who has no jurisdiction over the offence is not punishable under this section[2]. Similarly, disobedience to an order of a police-officer which he is not competent to issue is not punishable under this section[3]. The Chairman of a Municipality, although a public servant, is not legally competent as such to issue an order for attendance before him; and disobedience to such an order is not an offence within the meaning of this section[4]. *It was held similarly* where a Tahsildar[5], a Mahalkari[6], a Mamlatdar[7], and a Receiver[8] having no jurisdiction issued summons for attendance; where a Collector issued a notice under s. 193 of the Land Revenue Act when there was *no investigation, suit or other business before him*[9]; and where a Sub-Deputy Collector issued a notice under s. 8 of the Chowkeedaree Act (Beng. Act VI of 1820) for attendance[10].

The accused were appointed arbitrators in a civil suit. They were summoned to attend the Court on a certain day, but did not obey the summons. It was held that they could not be convicted under this section as the summons in question was a process not provided for by the law[11].

3. **'Intentionally omits to attend at that place or time, or departs... before the time'.**—The omission to appear in answer to the summons must be intentional[12]. If the witness explains his inability to the process-server that he will not be able to attend, he does not "intentionally" disobey the summons[13]. It must be proved that the *non-attendance was in the nature of a wilful disobedience*[14]. Before conviction the Court is bound to decide whether there was an intentional disobedience to the summons after giving the accused an opportunity of explaining his absence[15]. If a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this would be sufficient excuse for him not to attend a Court in obedience to a summons. The mere fact that he was not so dangerously ill that he could not be moved or that he did not send a man to inform the Court of his illness, would not render him punishable under this section[16].

A man in obedience to a summons attended a Magistrate's Court at 10 A.M., but finding the Magistrate not present in Court at the time mentioned in the summons, departed without waiting for a reasonable time. It was held that he was guilty of an offence under this section[17]. *But a person* who departs without permission is not guilty under this section in the absence of a direction that he should not leave without permission[18].

A witness was summoned by the High Court to give evidence and left the jurisdiction without being discharged as a witness and without the permission of the Court, in order to avoid giving evidence. It was held that such conduct amounted to contempt, and that the High Court had inherent jurisdiction to punish for that contempt, provided that this summary remedy was necessary as where proceedings in the ordinary course of law were not calculated to put a timely and efficient check upon the wrong-doer, and provided further that the specific offence was distinctly stated and the person in contempt had an opportunity of answering the charge[19].

1 *Kashi Ram*, (1871) P. R. No. 2 of 1871.
2 (1865) 1 Weir 87.
3 *Chattar Singh*, (1885) 5 A. W. N. 43.
4 *Purshottam Valji*, ((1868) 5 B. H. C. (Cr. C.) 33.
5 *Gopia*, (1904) 24 A. W. N. 122; *Khota Ram*, (1907) P. R. No. 4 of 1907; *Shiam Lal*, (1914) 12 A. L. J. 680.
6 *Venkaji Bhaskar*, (1871) 8 B. H. C. (Cr. C.) 19.
7 *Mahomed Ismail*, (1873) Unrep. Cr. C. 70, Cr. R. of 1873.
8 *Ebrahim Sircar*, (1901) 29 Cal. 236.
9 *Waris Ali*, (1916) 14 A. L. J. 1069.
10 *Basat Ali*, (1899) 3 C. W. N. cclxxi.
11 *Kashi Ram*, (1871) P. R. No. 2 of 1871; *Kuria*, (1875) P. R. No. 18 of 1875.
12 *J. R. Das*, (1923) 1 Ran. 549.
13 *Ramdhir*, (1880) P. R. No. 22 of 1880.
14 *Ungun Lall*, (1869) 1 N. W. P. 303. See *Todd*, (1882) 2 A. W. N. 52; *Sreenath Ghosh*, (1868) 10 W. R. (Cr.) 33.
15 *Ramun*, (1906) P.W.R. (Cr.) No. 27 of 1907.
16 *Bohra Birbal*, (1922) 20 A. L. J. 192.
17 *Kisan Bapu*, (1885) 10 Bom. 93; *Sutherland*, (1870) 14 W. R. (Cr.) 20.
18 *Narayanappa*, (1890) 1 Weir 99.
19 *Ebrahim Mamoojee*, (1926) 4 Ran. 257.

Public servant absent.—Where a public servant is absent on a date fixed in the summons, the person summoned cannot be convicted, though he purposely fails to attend[1].

Appearance through a lawyer instead of in person—Where a person did make an appearance, though not a personal appearance, on service of summons, it was held, under the circumstances not to be an offence under this section[2] But having regard to Sch V of the Code of Criminal Procedure, if a summons require appearance in person, the accused is legally bound to attend personally and cannot appear by agent unless exempted under s 205

The petitioner, a practising barrister of the High Court, was summoned under the Motor Vehicles Act, but being unable to appear owing to professional work on that day applied for adjournment through counsel, which was granted

[illegible]

appear, that as an officer of the Court it was the duty of the advocate no less to the Bench than to his own client to be ready when the case in which he was briefed was called, and that finding himself unable to abandon his client s interests he had instructed counsel to represent the matter to the Court, and that no offence under this section was committed[3]

Personal service necessary.—Before the provisions of this section can come into play, personal service of summons must be attempted[4] Where a summons was shown to a person and taken back, it was held that it had not been served so as to render that person liable under this section for non attendance[5] Service of a notice on the pleader of a party is not sufficient in criminal cases[6] The mere affixing of summons to the house of the person required to attend is not sufficient It should be proved that it was brought to the knowledge of the accused that he was required to attend[7]

Escape from custody.—The section does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a civil Court[8]

Madras Regulation IV of 1816.—The provisions of this section are not in conflict with the special provisions of ss 15 and 16 of Regulation IV of 1816 (Madras) In ordinary cases obedience to the summons of a Village Munsif should be dealt with under the Regulation But if a charge is laid under the Penal Code the criminal Court must deal with it[9]

Madras Act III of 1869.—There are several cases deciding whether disobedience to a summons issued by a Tahsildar under *Act III of 1869 is punishable* under this section or not[10]

Statutory application.—See the Coroners Act (IV of 1871), s 17, the Dekkhan Agriculturists' Relief Act (XVII of 1879), s 40, the Native Converts Marriage Dissolution Act (XXI of 1866), s 11, the City of Madras Municipal Act (Mad. Act I of 1884), ss 161, 454

1 *Krishtappa* (1896) 20 Mad 31, *Lalu*, (1909) 3 S L R 155

2 *Durga Das Rakhit* v *Umesh Chandra Sen*, (1900) 27 Cal 980

3 *J R Das*, (1923) 1 Ran 549

4 *Hurynath Choudry* (1867) 7 W R (Cr) 58 [illegible]

(1882) 1 Weir 85

8 *Sardar Pathu* (1863) 1 B H C 38, (1874) 7 M H C App 43, *Dhola*, (1870) P P No 27 of 1870 Contra, *Heera Singh*, (1870) P R No 1 of 1871

9 *Ramachandrappa*, (1893) 6 Mad 249

10 (1871) 6 M H C App 44, *Reddi* [illegible] *suramayya*, (1889) 1 Weir [illegible] [illegible]

PRACTICE.

Evidence.—Prove (1) that the obligation to attend was in obedience to a summons, etc.

(2) That such summons, etc., was issued by a public servant, legally competent as such, to issue the same.

(3) That the accused became thereby legally bound to attend, in person or by agent, at a certain place and time.

(4) That he omitted to attend at such place or time; or that he departed from the place before the time at which it was lawful for him to depart.

(5) That he did as above intentionally.

To bring the case within the second clause it must be further proved—

(6) That the summons or notice was to attend in person or by agent in a Court of Justice.

It must be proved that it was brought to the knowledge of the accused that he was required to attend and that he intentionally omitted to do so[1]. The mere production of the summons to the accused with an endorsement of service is not sufficient proof of service in the absence of the evidence of the officer who is said to have served the summons[2].

A summons directing a person to appear within a certain number of days does not comply with the requirement of this section[3].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is necessary[4]. An offence under this section cannot be tried by the officer whose order is disobeyed[5].

Omission to produce document to public servant by person legally bound to produce it.

175. Whoever, being legally bound[1] to produce or deliver up any document to any public servant[2], as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the document is to be produced or delivered up to a Court of Justice[3], with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATION.

A, being legally bound to produce a document before a Zila Court, intentionally omits to procure the same. A has committed the offence defined in this section.

COMMENT.

A witness who having a document does not produce it comes under this section and not under O. XVI, rr. 17-18, of the Civil Procedure Code[6].

1. **'Legally bound'.**—See s. 43, *supra*.

1 Weir (3rd Edn.) 47.
2 *Odda Kolanthan,* (1889) 1 Weir 85.
3 *Somanath,* (1894) 1 Weir 82.
4 Criminal Procedure Code, s. 195. See also ss. 476-78, 487.
5 *Deo Saran Tewari,* (1918) 16 A. L. J. 432.
6 *Premchand Dowlatram,* (1887) 12 Bom. 63. See also *Salig Ram,* (1890) 10 A. W. N. 171.

2. 'Public servant'.—See s. 21, *supra*.

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with, is not legally bound to produce it, and he cannot, on his failure to do so, be convicted under this section[2]

Where an accused, while on his trial for offences under ss 471 and 193 of the Penal Code, being directed to produce a certain incriminating document, did not produce the document and in consequence the prosecution against him failed, it was held that he could not be convicted for his omission to produce it[3]

3. 'Court of Justice'.—See s. 20, *supra*

Statutory application.—See the Coroners Act (IV of 1871), s 17, the Presidency Small Cause Courts Act (XV of 1882), s 83, the Land Acquisition Act ... the Bengal

r 21, of the present Code, and the omission from r 21 of all references to s 188 or other sections of the Penal Code, indicate that a party to a suit, who fails to comply with an order for production or inspection of documents, can be punished only in the manner prescribed by that rule, and is not punishable under this section or any other section of the Code[4]

PRACTICE

Evidence.—Prove (1) that it was a public servant, or a Court of Justice, against whom the offence was committed

(2) That the accused was legally bound to produce or deliver up the document in question to such public servant, or Court of Justice

(3) That the accused omitted to produce, or deliver up the document

(4) That the accused did so intentionally

The prosecution must prove that the accused was in possession of the document required to be produced when it is doubtful which of the two accused had the document, they could not be convicted[5]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Ch XXXV of the Criminal Procedure Code, or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily

When any such offence as is described in this section is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody, and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to a fine not exceeding two hundred rupees and in default of payment to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid[6]

... Court should specifically ... with any statement the

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4 *Ram Chand* (1910) P R No 15 of 1910

5 *Damri Ram*, (1917) 4 P L W 65

6 Criminal Procedure Code s 480

7 *Panchanada Tambiran*, (1869) 4 M. H C R 229

A Court other than the High Court can try persons for offences committed before itself only in cases to which s. 477, or 480 or 485 of the Criminal Procedure Code is applicable, and none of the sections is applicable when the accused is charged under this section[1].

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[2].

Omission to give notice or information to public servant by person legally bound to give it.

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant[1], as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law[2], shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence[3], or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Scope.—This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation[3], and not where the public servants have already obtained the information from other sources[4].

When once the information of the fact of the crime has reached the police, the object of the section has been fulfilled and no further duty imposed by it remains[5].

Ingredients.—This section requires—

1. That a person must be legally bound to give any notice or to furnish information on any subject to a public servant.

2. That he has intentionally omitted to give such notice or information in the manner and at the time required by law.

1. 'Legally bound to give any notice or to furnish information to any public servant'.—See s. 43, *supra*, To bring home the charge to the accused he must be shown to be legally bound to furnish information. Where a person is not legally bound to furnish information, this section does not apply. Thus where the owner of a house failed to give information to the police of suicide by a member of his family by falling into a well in the compound of his house, it was held that he was not guilty of an offence under this section because s. 45(1) of the Criminal Procedure Code imposes a duty on the owner of land of giving information of an offence and not on the owner of a house[6]. Mere servants,

1 *Seshayya*. (1889) 13 Mad. 24.
2 Criminal Procedure Code, s. 195. See also ss. 476-478, 480-482, 487.
3 *Phool Chand Brojobassee*, (1871) 16 W. R. (Cr.) 35; *Luchmun Pershad Gorgo*, (1872) 18 W. R. (Cr.) 22; *Kesree*, (1866) 1 Agra 37.
4 *Sashi Bhusan Chuckrabutty*, (1878) 4 Cal. 623; *Pandya Nayak*, (1884) 7 Mad. 436; *Gopal Singh*, (1892) 20 Cal. 316; *Sher Singh*, (1888) P. R. No. 5 of 1889.
5 *Sada*, (1893) Unrep. Cr. C. 674.
6 *Hiru Satua Desla*, (1928) 30 Bom. L. R. 1570, 9 Bom. Cr. C. 486.

Act[5] the Indian Succession Act[6] the City of Bombay Municipal Act[7] the Land Acquisition Act[8] the Code of Criminal Procedure[9] the Indian Registration Act[10], the Indian Mines Act[11] the Indian Works of Defence Act[12]

See s 21 *supra* as to the meaning of public servant

Presumption of knowledge of an offence —The refusal by a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence or render him liable under this section[13]

2 **'Intentionally omits to give such notice in the manner and at the time required by law'** —Where a person is under a legal duty to report certain facts and fails to report them he must be presumed to intend to conceal them Where a person failed to give information to the police of the explosion of fireworks which resulted in the death of a child as required by a statute it was held that he was guilty of an offence under this section[14] But where one of several persons bound to give information directed the village watchman to the knowledge of the others to make a re to do so it was held that no offence wa the persons intentionally omitted to give

3 **'If the notice, etc, respects the commission of an offence, or is required for preventing the commission of an offence** —This expression refers to the commission or prevention of some particular offence and not to the commission or prevention of offences generally Thus the information required to be given under s 565 of the Criminal Procedure Code cannot be said to be required for the purpose of preventing the commission of any particular offence though it may be required for preventing the commission of offences generally[15]

The word offence here denotes a thing punishable under the Code or under any special or local law when punishable under such law with imprisonment for a term of six months or upwards (s 40)

CASES

Omission to give information under s 45 Criminal Procedure Code —An omission by an owner of a house to give information of a sudden or unnatural death[17] is not an offence under this section because owners or occupiers of houses in a village are not owners or occupiers of land under s 45 Criminal Procedure Code[18] In order to support a conviction under this section against a person for not giving information of an occurrence falling under clause (*d*) of s 45 Criminal Procedure Code it is not necessary to show that the death actually occurred on his land when the circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden unnatural or suspicious the finding of the body being a fact from which a Court might reasonably

1 *Thakri* (1911) P W R (Cr) No 17 of 1911
2 Act III of 1864 s 20
3 *Act IV of 1871* s 17
4 Act XXVII of 1871 s 9
5 Act XIX of 1876 s 7
6 Act XXXIX of 192? s 317 (3)
7 Bom Act III of 1888 ss 473 155 (1) (?) 187
8 Act I of 1894 s 10 (?)
9 Act V of 1898 ss 44 and 45 (*a*) (*b*) (*d*) (*f*)
10 Act XVI of 1908 s 8?
11 Act IV of 1923 ss 12 31
12 Act VII of 1903 s 11
13 *Lahai Mundul* (1867) 7 W R (Cr) 29
14 *Narayanan Nambudripad* (1915) 17 M. L. T 263
15 *Sher Singh* (1888) P R No 5 of 1889
16 *Hussain Beg* (1909) 9 M L J 274 See *Fanatulla* (188) 15 Cal 386 *Bhola* (1905 1 N L R 133
17 Criminal Procedure Code s 45 (*d*)
18 *Mainda* (188?) 1 Weir 101

infer, in the absence of evidence to the contrary, that the death took place there[1]. A village Magistrate was convicted under this section for omitting to furnish to the police information that a jewel of the daughter of a certain person was either stolen or lost. It was held that as the information did not relate to the commission of the non-bailable offence of theft, which the Village Magistrate was bound to communicate to the Magistrate or police, under s. 45 (1) (c) of the Criminal Procedure Code, his conviction was illegal[2].

Liability of a Karnam.—A Karnam is legally bound to furnish true information regarding cultivation in his village[3]. But a Karnam who omits to submit cultivation accounts of his village in obedience to the orders of the Revenue Inspector is not guilty of an offence under this section[4].

Punjab Land Revenue Act.—Accused, a Zaildar, was convicted under this section for failing to give information of two cases of house-breaking, it being his duty under Rule 25, framed under s. 28 of the Punjab Land Revenue Act, "to report heinous crimes to the Police and Magistrate". It was held that, having regard to s. 43 of this Code, though a Zaildar was required by virtue of the rule to report, such rule did not cast upon him a legal duty to report, such as was imposed by a direct and express enactment of the legislature, so that he could be held merely as a Zaildar to be "legally bound to give information" of the commission of a heinous offence[5]. The accused, who was the *sarbarah* of a Zaildar, was convicted, under this section, of intentionally omitting to give information about a riot which occurred in his village which he was legally bound to furnish. It was held that even assuming that the duties and powers of a Zaildar's *sarbarah* were co-extensive with those of the Zaildar himself, the conviction could not be sustained, for a breach of the rules drawn up by the Local Government in regard to Zaildars, though it might subject the Zaildar to the displeasure of his employer and possibly endanger his emolument or position, could not be held to amount to a violation of a legal obligation within the meaning of this section, regard being had to the definition of the terms "illegal" and "legally bound to do" in s. 43 of the Code[6].

N. W. P. and Oudh Revenue Act.—A *jamabandi* prepared under rules made under s. 234 of the N. W. P. and Oudh Land Revenue Act III of 1901 is a register, and consequently if a Zamindar refuses to give the *patwari* of a village information as to the collection of rent made by him he is liable under this section[7].

The mere fact that a Zamindar realised more than the recorded rent from his tenant for a long time without giving information about it to the officials concerned, did not render him liable to be convicted for an offence under this section read with s. 46 of the U. P. Land Revenue Act inasmuch as under the latter provision he was not legally bound to give the information in the absence of a requisition for such information from a public servant[8].

The Central Provinces Land Revenue Act.—The appointment of a Mukaddum-gumasta under s. 137 of the Central Provinces Land Revenue Act does not absolve the Mukaddum from all responsibility to perform the duties laid on a Mukaddum by s. 141 of the Act. Where a Mukaddum has received information that a non-bailable offence has been committed in a village of which he is Mukaddum, and he is aware that the Mukaddum-gumasta has omitted to make any report, it is his duty to make the report himself and his omission to do so in an offence under the section[9].

1 *Matuki Misser*, (1885) 11 Cal. 619.
2 *Vemi Reddi Lacha Reddi*, (1909) 9 Cr. L. J. 224.
3 *Venkatanarasappa*, (1894) 1 Weir 111.
4 *Tolupur Bhagavannulu*, (1897) 1 Weir 105.
5 *Hari Singh*, (1893) P. R. No. 25 of 1894.
6 *Shah Muhammad*, (1886) P. R. No. 19 of 1886.
7 *B. Suraj Baksh Singh*, (1907) 10 O. C. 238.
8 *Budh Singh*, (1926) 27 Cr. L. J. 1367.
9 *Local Government v. Maniharsingh*, (1911) 7 N. L. R. 101.

PRACTICE

Evidence —Prove (1) that the accused knew of the circumstance, or had information in question

(2) That he was legally bound to give notice thereof or to furnish such information

(3) That such notice should have been given or such information furnished, to a public servant

(4) That he omitted to give such notice, or furnish such information, as required by law

(5) That he omitted to do so intentionally

For the second clause of the section prove further—

(6) That such notice or information had reference to the commission of the offence, or was required to prevent the commission of an offence or in order to apprehend an offender

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable [illegible] an entirely [illegible] 189 cannot be altered to one under this section[1]

Complaint —Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required[2]

Charge —It is not necessary to frame a charge under this section as the offence is a summons case but if it is necessary to do so the charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false and it should appear precisely what his duty was in the matter[3]

Sentence.—A sentence under this section should commence at once according to the rule contained in r 464 (2) of the Punjab Jail Manual and should not be postponed till the expiry of the term of imprisonment which the accused is undergoing in default of furnishing security[4]

Furnishing false information

177. Whoever, being legally bound to furnish information on any subject to any public servant[1], as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false[2], shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both,

or, if the information which he is legally bound to give respects the commission of an offence[3], or is required for the purposes of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both

ILLUSTRATIONS

(*a*) A, a landholder knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has

[1] *Arjan Mal*, (1922) 3 Lah 440

[2] Criminal Procedure Code s 195 See also ss 476 478 487

[3] *Moosubroo* (186.) 8 W R (Cr) 37

[4] *Chetsingh* (1918) P L R No 97 of 1918

occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(*b*) A, a village-watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section VII, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wilfully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in the latter part of his section.

Explanation.—In section 176 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460 ; and the word "offender" includes any person who is alleged to have been guilty of any such act.

COMMENT.

Section 176 deals with the omission to give information: this section, with the giving of false information. Under both the sections the liability depends upon legal obligation to give information. Persons who are not under any legal obligation to furnish information cannot be dealt with under these sections.

Scope.—This section contains two branches. The first branch—'*whoever being legally bound...or with both*'—deals with the simple case of a person who, being legally bound to furnish true information to a public servant, furnishes false information to him. It, therefore, does not apply to any falsehood told to a public servant, but to such statements only as he is '*legally bound*' (s. 43) to make[1]. Under the second branch—'*or if information...or with both*'—the information which a person is legally bound to give '*for the purpose of preventing the commission of an offence*' relates not to commission of offences generally, but to the commission of some particular offence[2]. The section does not apply to the case of any person who is examined by a police-officer making a false statement, but to cases where, by law, land-holders or village-watchmen are bound to give information, and to other analogous cases of the same description[3].

Ingredients.—This section requires—

1. That a person must be legally bound to furnish information on a particular subject to a public servant.

2. That he must furnish, as true, information on that subject which he knows or has reason to believe to be false.

1. 'Legally bound to furnish information...to any public servant'.—Sections 44 and 45 of the Criminal Procedure Code legally bind persons to give information regarding certain offences. See s. 43, *supra*, as to the meaning of 'legally bound'.

See s. 21. *supra*, as to the meaning of "public servant'.

Offence is committed if there is legal obligation to give information.—*False reports by police-officers.*—A police-officer at a police-station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the Station diary, refused to enter a report made to him concerning the

1 *Appayya*, (1891) 14 Mad. 484; *Suraji*, (1873) Unrep. Cr. C. 76; *Parmaya*, (1885) Unrep. Cr. C. 210.

2 *Panatulla*, (1887) 15 Cal. 386.

3 *Luckhee Sing*, (1869) 12 W. R. (Cr.) 23.

commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him was guilty under this section[1] Where a police officer who was bound to communicate information to his superior officer [illegible] omitted [illegible] Where [illegible] notoriously bad characters were in their houses or not, falsely reported that they were, it was held that the offence fell within the first branch of this section[3]

No offence where no legal obligation to give information —*False return to a superior* —Where the accused submitted to his official superior a false [illegible] return of lands in his enjoyment and also made a false statement to the same effect in a revenue inquiry, his conviction under this section was not upheld as he was not 'legally bound to furnish true information[4]

False information to a public servant —A person attempted to obtain his recruitment in the police of a district by giving certain information which he knew to be false to the District Superintendent of Police It was held that he did not thereby commit an offence under this section[5] Where a purchaser of a stamped paper not bound by any law to furnish any information to a stamp-vendor, gave a false name it was held that he committed no offence under this section[6]

False representation in a memorandum of appeal —It is not an offence to make a false representation in a memorandum of appeal not required by law to be verified[7]

2 **'Furnishes, as true, information on the subject which he knows or has reason to believe to be false'** —It is not necessary to prove an intention to defraud, it is enough to show that the information furnished as true was either known to be false or not believed to be true[8]

3 **'Offence'** means a thing punishable under the Code or under a special or local law when punishable under such law with imprisonment for a term of six months or upwards (s 40)

4. **'Regulation III of 1821'** —This was repealed by Act XVII of 1862

Amendment —The Explanation was added by Act III of 1894 s 5

Statutory application —The Sanitary Regulation (Bombay City) Act (Bom Act VI of 1867) s 7, the City of Bombay Municipal Act (Bom Act III of 1888), s 473, the Foreigners Act (III of 1864), s 21 the Income tax Act (XI of 1922), s 52, the Madras Local Boards Act (Mad Act V of 1884) s 115 A

PRACTICE.

Evidence —Prove (1) that the accused was legally bound to furnish the information in question to a public servant

(2) That he did furnish certain information in pursuance of such obligation

(3) That the information so furnished was false[9]

(4) That he furnished it as true although he knew, or had reason to believe it to be false

[1] *Muhammad Ismail Khan* (1897) 20 All 151

[2] *Syed Futteh Mahomed* (1874) 21 W R (Cr) 30

[3] *Panatulla* (1887) 15 Cal 386

[4] *Appayya* (1891) 14 Mad 484 dissenting from *[illegible]rasami Mudali* (1881) 4 Mad 144

[illegible]

In a similar case in Oudh the offence under [illegible] (Cr C) 42 under the Indian Stamp Act of 1862.

[7] *Ghanaya* (1879) P R No 17 of 1879, *Sunt Lal* (1881) P R No 41 of 1881

[8] Weir (3rd Edn) 68

[9] (1880) 1 Weir 106

For the second clause of the section prove further—

(5) That such information was with respect to the commission of an offence.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class—Summary trial if the offence falls under the first clause.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is necessary[1].

Charge.—If the offence comes under the second clause then a charge must be framed. It should run as follows:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being legally bound to furnish information on any subject, to wit——, furnished information which you knew (*or* had reason to believe) to be false [and the information which you were bound to give was in respect of commission (*or* prevention) of an offence (*or* apprehension of an offender)] and thereby committed an offence punishable under s. 177 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Refusing oath or affirmation when duly required by public servant to make it.

178. Whoever refuses to bind himself by an oath[1] or affirmation to state the truth, when required so to bind himself by a public servant[2] legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The refusal to take an oath amounts to contempt of Court. The person refusing may be dealt with under s. 480 of the Criminal Procedure Code summarily or the Court may proceed under s. 195 of the same Code. A witness in a civil case is entitled to payment of his expenses before he gives evidence. If he is not paid he is not bound to appear at all in answer to the summons, and it is no offence to refuse to give evidence on the ground of insufficient payment of expenses before the Judge has decided that the payment made was sufficient[2].

1. **'Oath'.**—See s. 51, *supra.*

2. **'Public servant'.**—See s. 21, *supra.*

Amendment.—The words "or affirmation" were added by Act X of 1873, s. 15.

Statutory application.—See s. 83 of the Presidency Small Cause Courts Act (XV of 1882).

PRACTICE.

Evidence.—Prove (1) that the accused was required by a public servant to bind himself by an oath or affirmation to state the truth.

(2) That such public servant was legally competent to require that the accused shall so bind himself.

(3) That the accused refused to bind himself as required.

1 Criminal Procedure Code, s. 195.

2 *Nga Pyo,* (1907) U. B. R. (P. C.) 9.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Code of Criminal procedure, or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily

Complaint—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[1]

Refusing to answer public servant authorized to question.

179 Whoever, being legally bound to state the truth[1] on any subject to any public servant[2], refuses to answer any question[3] demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT

The offence under the section consists in the refusal to answer a question which is relevant to the subject concerning which the public servant is authorized to inquire, or which at least touches that subject If a person gives false answers then he will be guilty under s 193 and not under this section

Whether a person who has once committed an offence under the last section can be held to have committed a further offence under this section when he refuses to answer the questions put to him is undecided[2]

1. 'Legally bound to state the truth'.—A person who is examined by a police officer under s 161, Criminal Procedure Code, is not legally bound to state the truth The legal obligation to speak the truth when so examined existed under the Code of 1882, but the effect of the omission of the word truly in s 161 of the present Code has been to do away with this legal obligation[3] A person cannot be convicted of this offence for refusing, when required by a police officer to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands[4]

Sections 121 to 132 of the Indian Evidence Act[5] enable witnesses to refuse to answer certain questions

Where, in a murder case, a witness persisted in refusing to answer material and important questions put to him repeatedly by the Court with the result that the Judge's attempt to get at the truth was partially frustrated, it was held that the witness was guilty under this section[6]

2. 'Public servant'.—See s 21, *supra*

3 'Refuses to answer any question'.—If a Judge asks questions with a view to criminal proceedings being taken against a witness, the witness is not bound to answer them, and cannot be punished for not answering them, under this section[7]

This section has nothing to do with the conduct of the accused in Court It has no application to a refusal to plead to a charge An accused who, on being charged before a Village Panchayat Court, said that he would not make any reply and remained silent was held to have committed no offence under this section[8]

1 Criminal Procedure Code, s 195 See also ss 476-478 480-482, 487

2 *Ram Ch*... [illegible]

3 [illegible] 4, *Saw*... [illegible] *ul* *Has*... [illegible]

4 *Fakira* (1875) Unrep Cr C 9?

5 Act of I 1872

6 *Har Narain* (1924) 22 A L J 1100

7 *Hari Lakshman* (1885) 10 Bom 185

8 *Tirumala Reddi*, (1923) 46 M L J 40

answer[1].

Complainant.—A complainant is not a witness punishable for refusi

Statutory application.—The Indian Succession Act (XXXIX of 1 s. 267 (3); the Public Gambling Act (III of 1867), s. 10.

PRACTICE.

Evidence.—Prove (1) that the accused was legally bound to state the tru to a public servant on the subject in question.

(2) That such public servant questioned him touching such subject.

(3) That such public servant was exercising his legal powers in putting suc questions.

(4) That the accused refused to answer such questions.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[2].

Refusing to sign statement.

180. Whoever refuses to sign any statement[1] made by him, when required to sign that statement by a public servant[2] legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

If a statement made to an officer of justice or other public servant is put into writing and the public servant being "legally competent to require" a person to sign that statement, does make the request, the refusal to sign under such circumstances constitutes the offence hereby made punishable[3].

1. **'Statement'.**—The statement must be such an one as the accused can be legally required to sign. See ss. 154, 164, 200, 364 of the Criminal Procedure Code, and s. 20 of the Coroners Act[4]. An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court, commits no ffence under this section[5]. But, if the accused refuses to sign his statement ecorded under s. 364 of the Code of Criminal Procedure, he commits it[6]. The quest report is not a 'statement', and a refusal to sign such a report is not nishable under this section[7].

Deposition.—A witness is not legally bound to sign his deposition in a venue enquiry[8], nor is he bound to sign or affix his thumb mark to his deposition a civil case[9], consequently he cannot be convicted under this section for his sal to sign it. Where a witness is bound to sign his deposition it is only after evidence has been read over to him and he has admitted it to be correct and refused to sign it that he will be guilty under this section[10].

nesh Narayan Sathe, (1889) 13 Bom.

ction 195, Crim. P. C. See also ss. 476-82, 487.

& M. 50.

IV of 1871.

pa, (1877) 4 Bom. 15; *Ba Tin*, (1906) 3 L. B. R. 199.

6 *Umar Khan*, (1917) 39 All. 399.

7 *Andi*, [1910] M. W. N. 366.

8 (1871) 6 M. H. C. App. 13; (1871) 1 Weir 112.

9 *Fateh Ali*, (1912) P. R. No. 8 of 1912.

10 *Mabali Ram*, (1881) 1 A. W. N. 43.

2 **'Public servant'.**—See s 21, *supra*

Refusal to sign a receipt for summons.—A mere refusal to sign a receipt for a summons is not an offence under this section[1]

PRACTICE

Evidence.—Prove (1) that the accused made the statement

(2) That he was required to sign such statement by a public servant

(3) That such public servant was legally competent to require him so to sign it

(4) That the accused refused to sign that statement

Procedure—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed subject to the provisions of Chapter XXXV of the Criminal Procedure Code, or if not committed in a Court a Presidency Magistrate or Magistrate of the first or second class—Triable summarily

Complaint—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[2]

False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation

181 Whoever, being legally bound by an oath or affirmation to state the truth on any subject to any public servant or other person authorized by law to administer such oath or affirmation[1], makes to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true[2], shall be punished with imprisonment[3] of either description for a term which may extend to three years, and shall also be liable to fine

COMMENT.

This section may be compared with s 191 It is more general Under it a false statement to any public servant is punishable Section 191 describes the offence in which the false statement is made at any stage of the judicial proceeding

Ingredients—This section requires—

1 That there must be a person legally bound by an oath or affirmation to state the truth on a subject to (*a*) a public servant, or (*b*) some other person authorized by law to administer such oath or affirmation

2 That he must make to such public servant or other person as aforesaid a statement touching that subject which is false, and which he either knows or believes to be false or does not believe to be true

1. **'Legally bound by an oath or affirmation to state the truth on any subject to any public servant, etc.'.**—See s 43 *supra*, as to the meaning of 'legally bound'

See s 51, *supra*, as to the meaning of 'oath'

See s 21, *supra*, as to the meaning of 'public servant'

[1] *Krishna Govinda Das*, (1892) 20 Cal 358 [2] Criminal F ... s ... See also ss 476 478, 480

'Authorized by law to administer such oath, etc.'—This section applies only where the public servant is "authorized by law to administer an oath"[1]; it does not apply where the public servant administers the oath in a case wholly beyond his jurisdiction[2]; and also where he is not competent to take a statement on solemn affirmation[3]. Where three persons, of whom one was a pleader, were tried together and convicted of having made false statements on solemn affirmation, about the same matter, in the course of an enquiry into the conduct of the pleader under the provisions of the Legal Practitioners Act, it was held that the conviction of the pleader was bad as his statement was improperly taken from him on solemn affirmation[4].

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegation in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant committed no offence under this section[5].

2. 'Makes to such public servant...any statement which is false, and which he either knows or believes to be false or does not believe to be true'.—The making of a false statement with no knowledge one way or the other as to its truth constitutes it a false statement since the person making it does not believe it to be true[6].

3. 'Shall be punished with imprisonment'.—The sentence must include a term of imprisonment, however short, to which a fine may be added[7].

False statement on oath.—The Bombay and Calcutta High Courts have held that this section does not apply to cases in which a person gives a false statement on oath before a public officer in a stage of judicial proceeding, such person being liable to be convicted under s. 193, but only refers to cases in which the false statement is made in proceedings other than judicial proceedings[8]. The principle on which these rulings are based being that when the facts found constitute an offence triable exclusively by the Court of Session, a Magistrate is not at liberty to pass over material points of the evidence before him, so as to withdraw the case from the cognizance of the proper tribunal. Although the wording of this section is apparently wide enough to admit false statements of every description, its action is restricted as regards those made under certain circumstances by the succeeding s. 193. Were it not so, a Magistrate acting under this section might try all cases of perjury himself instead of committing them, as he is no doubt bound to do, to the Court of Session. The Madras High Court has, however, held that a witness in a criminal case, who gives false evidence before a Magistrate, may be convicted by a Magistrate under this section though he might also have been charged under s. 193, and, if so charged, would only have been triable by the Sessions Court[9]. But in an earlier case it held that this section would appear to apply to cases in which the proceedings were not of a judicial character[10].

Amendment.—The words "or affirmation" were inserted by Act X of 1873 s. 15.

PRACTICE.

Evidence.—Prove (1) that the accused took the oath, or made the affirmation in question.

1 *Niaz Ali*, (1882) 5 All. 17; *Mooneappa Oodian*, (1870) 5 M. H. C. 326.
2 *Andy Chetty*, (1863) 2 M. H. C. 438.
3 *Kotha Subba Chetti*, (1883) 6 Mad. 252.
4 *Ibid.*
5 *Subbayya*, (1889) 12 Mad. 451.
6 *Echan Meeah*, (1865) 2 W. R. (Cr.) 47.
7 (1869) 4 M. H. C. Appx. 18.
8 *Buloram*, (1867) 7 W. R. (Cr.) 68; *Shama Churn Roy*, (1867) 8 W. R. (Cr.) 27; *Heeramun Singh*, (1867) 8 W. R. (Cr.) 30; *Nussurooddeen Shazwal*, (1869) 11 W. R. (Cr.) 24; *Dayalji Endarji*, (1871) 8 B. H. C. (Cr.) C. 21.
9 (1869) 4 M. H. C. App. 18; 1 Weir 115.
10 *Andy Chetty*, (1863) 2 M. H. C. 438.

(2) That the same was legally binding upon him

(3) That such oath or affirmation was administered by a public servant or by a person authorized by law to administer the same[1]

(4) That the accused whilst so bound made the statement in question to such person

(5) That such statement was made touching the subject on which he was thereby bound to state the truth

(6) That what he so stated was false

(7) That he then knew that his statement was false, or had reason to believe it was false or did not believe it was true

Procedure —Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate Presidency or first class

Complaint —Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required[2]

Charge —I (*name and office of Magistrate etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at—— being legally bound by an oath to state the truth on a certain subject, to wit—— to——, a public servant (*or* person authorized by law to administer such oath) did make to such public servant (*or* person as aforesaid) touching that subject, a statement which was false and which you knew (*or* believed) to be false to wit—— and thereby committed an offence punishable under s 181 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session)

And I hereby direct that you be tried [by the said Court (in cases tried by *Magistrate omit these words*)] on the said charge

False information with intent to cause public servant to use his lawful power to the injury of another person

182 Whoever gives to any public servant any information[1] which he knows or believes to be false[2], intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant—

(*a*) to do or omit anything which such public servant ought not to do or omit[3] if the true state of facts respecting which such information is given were known by him, or[4]

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both

ILLUSTRATIONS

(*a*) A informs a Magistrate that Z a police officer subordinate to such [illegible] ich inform [illegible] l cause the [illegible] section [illegible] in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z s premises attended with annoyance to Z A has committed the offence defined in this section

[1] *Juggut Chunder Dutt* (1866) 6 W. R (Cr) 81

[2] Criminal Procedure Code s 19 See a s ss 4 6 4 8 48

(*c*) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

COMMENT:

The present section was substituted for the original section by Act III of 1895, s. 1. In the old section clause (*b*) stood first, and clause (*a*) second. The present alteration arose out of a case in which, information having been given by a man to the police that he had been robbed at a certain village, the police went down and made enquiries and gave a great deal of trouble and annoyance to the people. It turned out that the information was absolutely false, but on prosecution the High Court of Calcutta ruled that inasmuch as it was not intended, or could not be shown that it was intended, to injure or annoy any particular person, the case did not fall within the section in question[1]. The present section has been introduced to amend that, and to say that if such information is given the person giving it should be punished whether any particular person was aimed at or not. That is to say, it has been made an offence to give false information which misleads a public servant into doing what he ought not to do, whether that can be shown to be intended for the purpose of injuring any particular person or not[2].

Object.—The intention of the legislature in drawing up this section is that a public servant should not be falsely given information with the intent that he should be misled by a person who believed that information to be false, and was intending to mislead him.

"Suppose a man, knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the district that a violent fire was raging in a city in the district of which he had charge. Now if the Magistrate believed that statement he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military, if there were any in the neighbourhood. That would be a perfect example of a hoax, and I have not a doubt that it would come within s. 182, whether the Magistrate acted upon the information or not. To take another example of a case which in my opinion would come within the section, although the public servant was not induced to take action or to omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad and that it was surmised that he would seek to escape at one of the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta amongst the number. A person who, knowing that that man had not been arrested, and intending that the authorities at Calcutta should cease to watch the outward bound shipping, telegraphed to the authorities at Calcutta informing them that the absconder had been arrested elsewhere, would in my opinion have committed an offence under s. 182, although the public servant at Calcutta had not acted on the telegram, but had persisted in his surveillance of the outward-bound shipping"[3].

Difference between s. 182 and s. 211.—The offence under this section is a distinct offence from that described in s. 211, which relates to an attempt to put the criminal Courts in motion against a person. The circumstances which are necessary to bring a case within this section involve different considerations

[1] *Golam Ahmed Kazi*, (1887) 14 Cal. 314.

[2] The case of *Golam Ahmed Kazi* is expressly overruled by ill. (*c*) The case of *Periannan*, (1881) 4 Mad. 241, may also be regarded as overruled.

[3] Per Edge, C. J., in *Budh Sen*, (1891) 13 All. 351, 355; *Ganesh Khanderao*, (1889) 13 Bom. 506.

from those that arise from s 211 This section does not necessarily impose upon the person giving information to an officer criminal liability for mere want of caution before giving that information There must be positive and conscious falsehood established[1] To constitute an offence under s 182, the information [illegible]

s 211 is further discussed

When either of the ss 182 and 211 is applicable at the instance of a Police Superintendent or a Magistrate, the discretion or power of one or the other to proceed is not limited in any way whatever by the discretion vested in the other[2]

Scope —A person can be prosecuted under this section even after the dismissal of his complaint to a Magistrate A person gave false information to the police and subsequently made a complaint to a Magistrate and the Magistrate issued a summons to the accused to appear but the complainant did not appear at the time of the hearing and the police reported that the complaint was false After [illegible] had given [illegible] It was [illegible] n dropping [illegible]

Ingredients —The section requires three essentials—

1 Giving of an information to a public servant

2 The information must have been known or believed to be false by the giver

3 The information must have been given with the intention to cause, or knowing it likely that it will cause, such public servant (a) to do or omit anything which he ought not to do or omit to do if the true facts were known to him, or (b) to use his lawful power to the injury or annoyance of any person

1 **'Gives to any public servant any information'** —The Bombay High Court has held that any 'false' information given to a public servant, with the intent mentioned in the section, is punishable under it, whether that information is volunteered by the informant or is given in answer to questions put to him by the public servant[4] The Patna High Court has adopted this view Where the driver of a m [illegible] by a police off [illegible] under this se [illegible] expression 'gi [illegible] to apply to a statement made in answer to questions put by a public servant[5] But this view has not been accepted by the Lahore High Court which has held that a person who makes a false statement in a departmental inquiry comes within the purview of this section notwithstanding that it was made in answer to questions[7] The former Judicial Commissioner's Court, Upper Burma, was of the [illegible] in the [illegible] But [illegible] not be

[1] *Ramkrishna Yeshwant* (1900) 9 Bom L. R 33 37, 31 Bom 204

[2] *Jang Bahadur Singh* (1928) 26 A L J 533

[3] *Mula* (1918) 17 A L J 32, *Bakhshi*, (1923) 46 All 43

[4] *Ramji Sajabarao*, (1885) 10 Bom 124, *Bhikaji* (1877) Unrep Cr C 124 Cr R No 171 of 1877

[5] [illegible]

restricted to imply 'volunteers'. A certain building was burnt down and a first information report was lodged. While the enquiry was pending, the accused was examined by the investigating officer, who took down his statement which was not signed by the accused. On the accused being charged with an offence under this section it was held that the statement made by the accused was not an information given to a police-officer but was made under s. 161 of the Criminal Procedure Code[1].

If the false information is given to a person who is not a public servant, the offence will be that of defamation[2].

See s. 21, *supra*. as to the definition of 'public servant'.

No offence under this section can be made out in respect of a false information given to a police-officer of a Native State[3].

Statement made by an accused in his defence.—Statements made by an accused for the purposes of his defence do not fall under this section[4]. Where the petitioner on being questioned by a Superintendent of Police whether he was the author of certain mischievous articles that appeared in a paper said he was not the author but some one else was when in reality he was the author, it was held that as the statement was given merely in defence or excuse he was not guilty of an offence under this section[5]. In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witness. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant had not committed an offence under s. 181 or this section[6].

Statement made by an accused in his application for transfer of his case.—In support of an application to transfer a case, a person swore to an affidavit and handed it over to the pleader of the applicant who filed it in Court. The affidavit contained allegations which were subsequently found to be false. The deponent was prosecuted under this section. It was held that the affidavit having been given to the applicant's pleader on his behalf and as it was open to the applicant to instruct his pleader not to file the same there was no information given to a public servant within the meaning of this section[7]. Where the accused in support of an application for the transfer of the case against him to some other Magistrate made unfounded and defamatory allegations against the trying Magistrate, the Allahabad High Court held that he could not be prosecuted under this section[8]. The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal Procedure Code upon answers to questions put to the accused by the Court[9].

Mere belief is not 'information' under this section.—Where a person falsely informed a Collector that certain Zamindars had usurped possession of certain land belonging to Government, with the intent "to give trouble to such Zamindars, and waste the time of the public authorities", it was held that as the information was no more than an expression of a private person's belief or opinion that the Collector might, if he chose, sustain a civil action against them, this was

1 *Sultan* v. *Major C. De M. Wellborne*, (1925) 3 Ran. 577.
2 *Santaram*, (1887) Unrep. Cr. C. 315, Cr. R. No. 1 of 1887.
3 *Rambharathi Hirabharthi*, (1923) 25 Bom. L. R. 772, 7 Bom. Cr. C. 78, 47 Bom. 907.
4 *Daria Khan*, (1870) 2 N. W. P. 123.
5 *S. · Gordon*, Criminal Appeal No. 22 of 1910. (Unrep. Bom.) Per Batchelor and Davar, JJ., decided on the 10th March, 1910.
6 *Subbayya*, (1889) 12 Mad. 451.
7 *Katta Prakasam*, (1924) 47 M. L. J. 658, [1925] M. W. N. 146.
8 *Matan*, (1910) 33 All. 163.
9 *Ghulam Muhammad*, (1922) 3 Lah. 46: *Allah Wasai*, (1925) 1 Lah. C. 524.

not the information contemplated by this section[1] Where a person in whose house theft took place informed the police that he suspected two persons whom he named as the perpetrators of the crime, it was held that that did not amount to giving false information[2]

Information must be given by the accused —When the information on which proceedings are taken is not given by the accused, a conviction under this section cannot stand One S made a report at a police station On enquiry the investigating police officer came to the conclusion that the report was false and that it had been made at the instance of one U The Sub Inspector sent a report to the Assistant Superintendent of Police asking that action should be taken under this section against S and U The Assistant Superintendent of Police declined to take action but sent the report to the Sub divisional Magistrate, who took cognizance of an offence against S and U under this section It was held that the Sub divisional Magistrate had no jurisdiction to take any action under this section Report of a police officer was not a complaint under s 195 (1), Criminal Procedure Code U, not having given the information himself could not be prosecuted under this section[3] Where one person makes a report false to his knowledge that certain persons had collected in a suspicious manner, with the object of causing the police authorities to commence criminal proceedings against them in respect of an offence which they had not committed, and another person corroborates him the report is made jointly by them and they both are guilty of an offence under this section[4]

2 **'Knows or believes to be false'** —The information given should be information which the accused knew or believed to be false[5] But he cannot be convicted if he shows that he had reasonable grounds for believing the information to be true He is not bound to show that it was in fact true[6]

Where the accused falsely telegraphed to a District Magistrate that a town was attacked by a gang of 200 robbers and the Magistrate put no faith in the telegram and took no action, it was held that the accused were guilty of the offence under this section[7] Where the accused got enlisted in the police force calling himself *jat* being an *ahir*, a caste whose enlistment was prohibited, it was held that this offence was committed[8]

3 **'To do or omit anything which such public servant ought not to do or omit'** —It is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given, but the in[illegible] person supplying such [illegible] tent to act on the in[illegible] uch would be an illegal [illegible] within the purview of this section The information must be information regarding a fact which would induce the public servant to do something which he would be legally competent to do if he had been cognizant of the true facts[10] Where a person gave a false information to a village Magistrate with the view to it being passed on to another officer (Station house officer) charging another with having committed an offence, he

[1] *Madho* (1882) 4 All 498 See *Santaram* (1887) [illegible] W N [illegible] 32 of 1884 *Moulvy Abdool L teef* (1868) 9 W R (Cr) 31 *A Gopala Kristnayya* (1902) 1 Weir [illegible]

[4] [illegible]

121 [illegible] All 336 *Lachman Singh* (1928) 9 Pat 715

[10] *Manohar* (1918) [illegible] L [illegible]

was held guilty under this section[1]. Information given to A (the village Magistrate) for the purpose of being passed on to B (the Station-house officer) and which it was his bounden duty so to pass on must be considered as having been given to B so as to justify his taking the complaint in writing from the accused under s. 154, Criminal Procedure Code[2]. A false report to the police regarding the commission of a non-cognizable offence does not come under this section[3]. Under this clause it is not necessary to show that the act done will be to the injury or annoyance of any third person[4].

The words "ought not to do or omit" imply duty and exclude personal choice.

The word 'omit' indicates an operation on the mind of the officer which has a result of making that officer give up a purpose which he otherwise would have pursued. It does not indicate placing an obstacle in the way of the officer performing his duty and thus preventing or making it more difficult for him to carry out an intention which was in his mind[5].

4. **'To use the lawful power...to the injury'.**—See s. 44, *supra*, as to the meaning of 'injury'. Where a person gives false information to an officer who can exercise his power to the direct and immediate prejudice of another against whom the information is levelled, this offence is complete[6].

Using lawful powers of a public servant to the injury another.—Where a person made a petition to the police falsely stating that he suspected another person of having committed an offence and prayed for an inquiry, it was held that he would come within the purview of this section as he had given false information with intent to cause a public servant to use his lawful powers to the injury of another person[7]. P appeared before a District Magistrate and made a statement in which he accused a certain police-officer of having beaten him, demanded a bribe of him, and locked him up in the police cell. He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined P on oath, and, subsequently, the charge having been found to be baseless, P was convicted under this section and s. 193. It was held that, inasmuch as P had expressly stated that he did not wish to make a complaint, the statement must be taken to have been made to the District Magistrate, not as a Magistrate, but as head of the district police, and the conviction under s. 193 could not be upheld[8].

A person stated to a police-officer—"I find there has been a theft: I suspect the persons named, and I want an inquiry to be made". It was held that, if the statement was false, the offence committed fell under this section[9]. Where a person falsely gave information to the police that a horse belonging to him had strayed, when in fact he had sold it some time previously, and did this with the intention that a charge should be brought against the purchaser, it was held that he was guilty under this section[10].

Where the accused had presented a petition to the District Magistrate, giving certain information against A, and praying that A should be proceeded against under s. 110, Criminal Procedure Code, and the District Magistrate considered such information to be false, it was held that the District Magistrate was right in granting sanction to prosecute the accused under this section, notwithstanding the fact that the petition containing the information was not signed by the accused[11].

1 *Jannalagadda Venkatrayudu*, (1905) 28 Mad. 565.
2 *Ibid.*
3 *Algoo Lal*, (1920) 18 A. L. J. 636.
4 *Ganesh Khanderao*, (1889) 13 Bom. 506.
5 *Lachman Singh*, (1928) 9 Pat. 715.
6 *Shripati bin Waman*, (1897) Unrep. Cr. C. 946.
7 *Gopal Bhikaji*, (1873) Unrep. Cr. C. 72.
8 *Phulel*, (1912) 35 All. 102.
9 *Mathura Prasad*, (1917) 39 All. 715.
10 *Incha Ram*, (1922) 44 All. 647.
11 *Gokal*, (1909) 3 S. L. R. 132.

Statutory application —See the Indian Companies Act (VII of 1913) s 244

CASES

Personation —A personated B at an examination called the Vernacular Sixth Standard Examination A passed the examination and obtained a certificate from the Educational authorities in B s name B thereupon applied to the Assistant Collector to have his name entered in the list of candidates for Government service He attached to this application the certificate issued in his name and his name was ordered to be entered in the list of candidates It was held that he was guilty under this section[1] B appeared before a Village Registrar and falsely personated W and in such assumed character expressed a desire to execute a lease in favour of A who was present and assented to take the lease When B made some mistakes in giving the area of the land C corrected him A identified B as W before the Village Registrar and E and D assured the attesting witnesses that B was W It was held that C D and E could not be convicted under *s 82 (d) of the Registration Act 1877 but that they were guilty* of an offence under this section[2] A person signed a notice of transfer of survey numbers in the character of his father who was dead and the declaration to the notice was signed by the accused who confirmed the assumed character It was held that the accused was guilty of giving false information to a public servant[3] By reporting falsely that his father had died the accused induced a Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father It was held that he had committed an offence under this section[4]

False statement in a petition —An accused who has made a false statement in a petition of appeal cannot be held to have committed an offence under

h the object of

d of the case,

it ought not to

have done It was held similarly where the false statement was made in a memorandum of appeal[5] Where a person submitted a petition of resignation to a Collector as the officer in charge of the Court of Wards and such petition contained an untrue account of an affray and defamatory statements and the Collector as District Magistrate ordered the petitioner s prosecution for giving false information under this section it was held that no offence under it was committed[7]

Income-tax return —Where a person does not sign the declaration in *his income tax return as to his other sources of income* the *mere mention* of some source of income alone in a previous part of the return which was signed will not make the return false within the meaning of this section[8]

PRACTICE

Evidence —Prove (1) that the person to whom the information was given was a public servant

(2) That the accused gave the information in question to that public servant

(3) That such information was false

[1] *Ganesh Khanderao* (1889) 13 Bom 506 *Gokal* (1879) P R No 34 of 1879 *Amir Ali*
[2] *Bala bin Kashaba* (1895) Unrep Cr C. 761
[3] *Mulharji* (188?) Unrep Cr C. 182.
[4] *Ismail* (1914) 15 Cr L J 603
[5] *Sunt Lal* (1881) P R No 41 of 1881,

(4) That the accused knew or believed such information to be false when giving it[1]. The fact that an information is shewn to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false[2].

(5) That the accused intended thereby to cause, or knew that it was likely that he would thereby cause, such public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts were known to him; or that he intended thereby to cause or knew that it was likely that he would thereby cause such public servant to use his lawful powers to the injury or annoyance of any person.

A decision in a previous case is not admissible to prove the falsity of the information given by the accused. Evidence must be adduced in their presence[3].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate. Presidency, first or second class—Triable summarily.

Where as the result of a police investigation it appears that a complaint made to the police of the commission of an offence is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegation before his prosecution under this section[4].

Before proceeding under this section, a Magistrate should enquire into and dispose of the original complaint or information[5]. The Magistrate has no jurisdiction to order a prosecution for making a false complaint, till that complaint is finally determined[6].

An acquittal under this section is no bar to a subsequent prosecution under s. 500[7].

Madras Rule.—When an offence falls under two sections of the Penal Code the one general and cognizable by an inferior tribunal. the other specifying aggravated circumstances and cognizable by a superior tribunal only, the jurisdiction of the inferior tribunal is not necessarily ousted. The inferior tribunal must determine whether it will dispose of the case under the general section, or commit the case to a superior tribunal, having a discreet regard to the gravity of the circumstances of the particular case[8].

Complaint.—Complaint in writing of the public servant concerned. or some other public servant to whom he is subordinate, is necessary[9].

The essence of an offence under this section is not the falseness of the information as it is the essence of an offence under s. 211 but the contempt of the lawful authority of the public servant and unless and until the public servant concerned chooses to move in the matter the Court has no authority to do so *suo motu* by whatever process it reaches that result[10].

Where an information to the police is followed by a complaint to the Court, then the Court must file a complaint even for a prosecution of the informant in respect of the false charge made to the police[11].

1 *Mavley Abdool Luteef*. (1868) 9 W. R. (Cr.) 31. See *Chandra Kumar De*, (1926) 44 C. L. J. 230.

2 *Rayan Kutti*, (1903) 26 Mad. 640: *Nga Lu Po*, (1908) 1 U. B. R. (P.C.) (1907-1909) 19, 10 Cr. L. J. 12: *Kartar Singh*, (1928) 29 Cr. L. J. 753.

3 *Ram Dass Boistub*. (1869) 11 W. R. (Cr.) 35.

4 *Raghu Tiwari*. (1893) 15 All. 336.

5 *Jamni*, (1883) 5 All. 387: *Thangappa Pallavarayan*. [1928] M. W. N. 673.

6 *Gati Mandal*. (1905) 4 C. L. J. 88: *Gunamony Sapui*. (1899) 3 C. W. N. 758.

7 *Ramsebak Lal* v. *Muneswar Singh*. (1910) 37 Cal. 604.

8 M. H. C. R. P., s. 44.

9 Criminal Procedure Code. s. 195. See also ss. 476-478. 487: *Jugal Kishore*. (1886) 8 All. 382: *Poonit Singh* v. *Madho Bhot*, (1886) 13 Cal. 270.

10 *Muthu Goundan*, [1925] M. W. N. 108, 21 L. W. 661.

11 *Brown* v. *Ananda Lal Mullick*, (1916) 44 Cal. 650; *Daroga Gope*. (1925) 6 P. L. T. 515.

A Deputy Magistrate has no power to question an order made by his superior[1]

A complaint should not be instituted against a person without hearing the objection of that person[2]

A person who lays information to the police is entitled to have his case judicially determined before he is called upon to answer the charge of giving false information under this section[3]

Separate conviction for one statement —An information was given to a police officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered on complaint the information was found to be false and the accused was convicted and punished for two offences under this section as affecting two different persons It was held that he could be charged with having made only one false statement and punished for one offence[4]

183 Whoever offers any resistance to the taking of any property[1] by the lawful authority[2] of any public servant[3] knowing or having reason to believe that he is such public servant shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both

Resistance to taking of property by lawful authority of public servant

COMMENT.

acting in good faith under colour of their office is not lost to them by reason of any mistake on their part in the exercise of their proper functions A public servant may do an act of a kind which he has no authority to do In such case, he could not be acting in discharge of his public functions (sections 186 353) and the lawful authority required by section 183 would be clearly wanting If on the other hand the act of the public servant is an act of the kind which the public servant is authorised to do it is clear that no miscarriage on his part due to an honest mistake of fact could render him liable to a prosecution Section 79 would afford him protection Furthermore resistance to such an act is made punishable under section 183 [5]

1 **'Offers any resistance to the taking of any property** —See s 22 *supra* as to the definition of property

A decree having been passed against the assets of a deceased debtor execution was taken out and an officer of the Court proceeded to seize certain goods The accused successfully resisted the seizure asserting that the goods seized were his own He was held guilty under this section[6]

Refusal is not resistance —A mere refusal by an accused person to hand over to a bailiff money alleged to be in his pocket does not amount to a resistance to the taking of that money within the meaning of this section[7] A mere oral statement by a person claiming to be the owner of certain articles attached by a bailiff,

[1] *Irad Ally* (1879) 4 Cal 869 *Ch Jernal* (1929) 117 I C 147

[2] *Kala Khan* (1908) P W R (Cr) No 46 of 1908

[3] *Munshi Isser* (1910) 14 C W N 765

[4] *Poon t Singh* v *Madho Bhot* (1886) 13 Cal 270

[5] Per Shephard J in *Tiruchittambala Pathan*, (1896) 21 Mad. 18 79

[6] *Ibid*

[7] *Alibhai* (1888) Cr R. No 77 of 1888 Un rep Cr C. 412

to the effect that he would not permit the bailiff to take away the articles unless the bailiff entered them as his property does not amount to an offence under this section[1]. But, where a person not only refused to give up the property but threatened to do harm to the police-officer if he ventured to carry out the warrant, it was held that he committed an offence under this section, since the threat was an overt act sufficient in law to constitute 'voluntary obstruction'[2]. In the absence of a contract to the contrary, factors may, under s. 171, Indian Contract Act, retain, as security for a general balance of account, any goods bailed to them, and, therefore, where goods were entrusted to a certain firm for sale and subsequently the Court of Wards took over the management of the estate of the owner of the goods, the refusal on the part of the proprietor of the firm to deliver the goods to the Court of Wards until the general balance of his account was settled, was held not to render him liable to a criminal prosecution for offering resistance to the taking of any property by the lawful authority of any public servant or for voluntarily obstructing a public servant in the discharge of his public functions[3].

Obstruction to the order of distraint.—A Village Munsiff has jurisdiction to distrain the property of a defaulter outside his jurisdiction, for arrears of revenue in respect of land within his jurisdiction, though, in the demand notice authorizing him to distrain, he be not referred to by his name but by his office. Obstruction to such distraint outside the local limits of his jurisdiction is, therefore, punishable under this section[4]. If the distraint is not bona fide a conviction under this section will not lie[5].

2. 'Lawful authority'.—This expression does not necessitate that the cases in which the person charged may have a civil action against the public officer must be excluded from the operation of the section[6]. "Taking the two (ss. 99 and this section) together, the reasonable construction to be put is that, if the officer acted in good faith under colour of his office, the mere circumstance that his 'act may not be strictly justifiable by law' cannot affect the lawfulness of his authority. And the chief reasons for this view are that the likelihood of serious injury resulting from such acts (excepting those tending to cause apprehension of death or grievous hurt) of persons clothed with public authority and subject to public responsibility is so small that the parties, whose rights are thus invaded, would be sufficiently protected by their being left to obtain redress solely by appealing to the constituted authorities in due course and that, in such cases, to secure an easy and peaceful execution of legal processes, it is necessary that recourse to self-help on the part of the persons affected should be disallowed"[7].

Lawful authority wanted.—Where a person resisted a peon in attaching property under a warrant, the term of which had already expired[8]; where the warrant directing the attachment of property was not signed by the judge or such officer as the court might appoint[9]; where a sheriff was resisted in attaching property under a defective warrant issued by a civil Court[10]; where a village watchman without the requisite written authority attached some property for levying the amount of arrears and resistance was offered to such attachment[11] it was held that the person resisting was not guilty of an offence under this section.

1 *Husain valad Tajbhai*, (1890) 15 Bom. 564.

2 *Pundlick Krishna Pai*, (1904) 6 Bom. L. R. 254; *Alibhai*, (1888) Unrep. Cr. C. 412, distinguished as "it was a mere case of refusal".

3 *Parakh*, (1925) 3 O. W. N. 160.

4 *Iyyemperumal Naiken*, (1902) 1 Weir 127.

5 *Soosaikannu Chetti*, (1898) 1 Weir 126.

6 *Tiruchittambala Pathan*, (1896) 21 Mad. 78, p. 80.

7 Per Subramania Ayyar, J., in *ibid*, p. 81.

8 *Anand Lall Bera*, (1883) 10 Cal. 18; *Rama Goundan*, (1891) 1 Weir 134.

9 *Karamatullah*, (1920) 21 Cr. L. J. 372.

10 *Prabh Dyal*, (1905) P. R. No. 49 of 1905. It was also held that he was not guilty under s. 186.

11 *Durga Charan Mali* v. *Nobin Chandra Sil*, (1897) 25 Cal. 274; *Yeshwant*, (1887) Unrep. Cr. C. 325.

Where a Court peon removed moveable property without giving any option to the judgment debtor to provide safe custody for the property as required by High Court circular orders, it was held that the subsequent taking back of the said property by the judgment debtor did not constitute an offence under this section[1]

If a bailiff breaks the doors of a third person, in order to execute a decree against a judgment debtor, he is a trespasser if it turns out that the person or goods of the debtor are not in the house, and, under such circumstances the owner of the house does not, by obstructing the bailiff, render himself punishable under this section or s 186[2]

Resistance to the taking of property without a warrant is lawful —It is the intention of the law that when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful[3]

3. **'Public servant'.**—See s 21, *supra*

PRACTICE

Evidence.—Prove (1) that the person resisted is a public servant

(2) That the property was being taken by his authority

(3) That such authority to take the property was lawful

(4) That the accused offered resistance to such taking

(5) That the accused at the time knew that it was a public servant who authorized such taking

Procedure —Same as that for s 182, *supra*

Complaint —Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[4]

Obstructing sale of property offered for sale by authority of public servant

184. Whoever intentionally obstructs[1] any sale of property[2] offered for sale by the lawful authority of any public servant[3], as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both

COMMENT

This section punishes intentional obstruction of the sale of any property conducted under the lawful authority of a public servant Notices given at public sales by persons having, or claiming, in good faith to have an interest in the property, will not be deemed an obstruction But it will be otherwise if they are not bona fide and merely for the purpose of injuring the sale

1. **'Obstructs'** —There must be something physical to constitute obstruction[5]. Where one person executed and another accepted a deed of sale of some property which was ordered to be sold in execution of a decree of a revenue Court, it was held that there was no obstruction to the sale within the meaning of this section[6] Because no effect whatever was produced on the sale by the existence of the deed

2. **'Property'.**—See s 22, *supra*

3. **'Public servant'.**—See s. 21, *supra*

[1] *Ahmed Sheik*, (1928) 47 C L J 188

[2] *Gazi kom Aba Dore*, (1870) 7 B H C (Cr C) 83, *Anderson v McQueen*, (1867) 7 W R (Cr) 12

[3] *Ganeshi Lal*, (1904) 27 All 258

[4] Criminal Procedure Code, s 195

[5] *Gopal Rai* (1904) 2 Cr L J 44

[6] *Badam Singh*, (W R

PRACTICE.

Evidence.—Prove (1) that the property was offered for sale.
(2) That such sale was by the authority of a public servant[1].
(3) That such authority was lawful.
(4) That the accused obstructed such sale.
(5) That he did so intentionally.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[2].

Illegal purchase or bid for property offered for sale by authority of public servant.

185. Whoever, at any sale of property[1] held by the lawful authority of a public servant[2], as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity[3] to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Object.—This section "makes it penal to bid at a public sale for property on account of a party who is under a legal incapacity to purchase it, or to bid for it not intending to complete the purchase, or as it is expressed to perform the obligations under which the bidder lays himself by such 'bidding'"[3].

A person who bids for the lease of a ferry sold at a public auction and fails to complete the sale is guilty of contempt under this section[4].

1. **'Any sale of property'.**—Any kind of property whether corporeal or not is contemplated by the section[5]. A person who bid at an auction of the right to sell drugs within a certain area under a false name and, when the sale was confirmed in his favour, denied that he had ever made any bids at all, was held to have committed an offence under this section[6].

2. **'Public servant'.**—See s. 21, *supra*.

3. **'Legal incapacity'.**—See s. 169, *supra*.

PRACTICE.

Evidence.—Prove (1) the holding of the sale.
(2) That such holding of the sale was by authority of a public servant.
(3) That such authority was lawful.
(4) That the accused bid for, or purchased such property, either for himself, or for some other person.
(5) That the person for whom he bid or purchased (whether for himself or some one else) was under a legal incapacity to purchase at the sale in question.
(6) That the accused then knew of such incapacity.

1 *Tara Singh*, (1905) 27 All. 480.
2 Criminal Procedure Code, s. 195.
3 2nd Rep., s. 110.
4 *Reazoodeen*, (1865) 3 W. R. (Cr.) 33.
5 *Ibid.*
6 *Bishan Prasad*, (1914) 37 All. 128.

It will also be sufficient to prove (1) (2) and (3) as above, and further,

(4) That the accused bid for such property

(5) That, when bidding, he intended not to perform the obligations under which such bidding placed him

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily

Complaint —Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[1]

186 Whoever voluntarily obstructs any public servant[1] in the discharge of his public functions[2], shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees or with both

Obstructing public servant in discharge of public functions

COMMENT

This

is obstructe

judicial offic

may be followed

The obstruction which is punishable by this section may be by an act voluntarily done or omitted in order to hinder the public servant in executing his duty

Ingredients —This section requires two essentials—

1 Voluntary obstruction to a public servant

2 Such obstruction must be in the discharge of public functions of such public servant

1 **'Voluntarily obstructs any public servant'** —The use of the word 'voluntarily indicates that the legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct[2] The word obstruction' means actual obstruction i e actual resistance or obstacle put in the way of a public servant The word implies the use of criminal force and mere threats or threatening language are not sufficient[3]

A District Judge ordered that the house of the defendant in a suit pending before him be searched and certain property brought to the Court and appointed a commissioner to carry out that order The commissioner went to the house, but the defendant shut the doors and would not admit him A crowd collected, and the commissioner felt it would be unsafe to proceed to carry out the order by force and was unable to do so otherwise It was held that the defendant had committed no offence under this section[4] Mere abuse cannot be held to be obstruction so as to constitute this offence[5] See s 39, *supra*, as to the meaning of voluntarily'

'Public servant' —A vaccinator[6], a process server[7], a union *karnam*[8], and a peon to whom execution of a warrant is delegated[9], are public servants within the meaning of this section, but not a person nominated by the Collector under the Bengal Tenancy Act for the purpose of making a division of crops between a land

[1] See s 195 Criminl Procedure Code

[2] *Sommanna* (1892) 15 Mad 221 See *Pundlick Krishna Pai*, (1904) 6 Bom L R. 254

[3] *Darlan* (1928) 29 Cr L J 645 *Bhaga Mana* (1927) 30 Bom L R 364 9 Bom Cr C. 245

[4] *Sommanna* sup See *Nishi Kanta Pal*, (1916) 20 C W N 857

[5] *Sooraparazu Singayya* (1894) 1 Weir 621

[6] (1881) 1 Weir 129

[7] *Bhagai Dafadar* (1868) 2 Beng L. R 21 10 W R (Cr) 43 F B

[8] *Gopalsaminatha Aiyen* (1893) 1 Weir 198

[9] *Dharam Chand Lal* (1895) 22 C 596

lord and tenant[1], nor a receiver appointed under the Land Registration Act[2], nor a Local Board Sircar[3]. See s. 21, *supra*, for the definition of the term 'public servant'.

2. 'In the discharge of his public functions'.—According to the Calcutta and Lahore High Courts the 'public functions' contemplated by this section mean legal or legitimately authorized public functions, and *are not intended to cover* any act that a public functionary may choose to take upon himself to perform[4]. It must be shown that the obstruction or resistance was offered to a public servant in the discharge of his duties or *public functions, as authorised by law*. The mere fact of a public servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence[5].

It has, however, been held by the Madras and Allahabad High Courts that even though the act of the public servant is not strictly legal yet any obstruction caused to him when he is discharging his function in good faith would come under this section[6]. The Patna High Court has held in a case that although it is improper for a nazir to depute one of his assistants to execute a warrant for the delivery of possession which is directed to the nazir himself, yet the assistant is sufficiently clothed with authority to execute the warrant, and any person offering resistance or obstruction to its execution is guilty of an offence under this section[7].

The decisions of the Bombay High Court are not unanimous on the point. It has held in two cases that if a public servant bona fide believed that he was discharging his public functions within the scope of his authority, even though he was mistaken as to the extent of his powers, an obstruction caused to him would be punishable under this section[8]. Where an officer, subordinate to an officer in charge of a police-station, was deputed by the latter to make an inquiry under s. 135, Criminal Procedure Code, attempted without a search warrant to enter into a house in search of property alleged to have been stolen, and was obstructed and resisted, it was held (applying s. 99 of the Indian Penal Code) that, even though the police-officer was not strictly justified in searching the house without a warrant, the person resisting and obstructing could *not set up the illegality of the officer's proceeding* as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice[9]. But in subsequent cases it has held that even though a public servant *is acting in good faith*, if the order under which he acts is illegal or *ultra vires*, any obstruction caused to him would not be punishable under this section[10]. The public servant's intentions may have been perfectly honest, but *if in fact and in law the functions in the discharge of which he* is obstructed are not public functions, then no offence is committed. The functions will not be public functions if they fall wholly outside the jurisdiction or authority which he as a public officer possesses[11]. The accused, a timber merchant, purchased certain timber in the Central Provinces and brought it into East Khandesh. The merchant from whom he purchased had brought it from the Indore State. A Forest Ranger of East Khandesh being of opinion that the timber was liable to duty under

1 *Chatter Lal* v. *Thacoor Pershad*, (1891) 18 Cal. 518.

2 Beng. Act VIII of 1876, s. 56; *Ebrahim Sircar*, (1901) 29 Cal. 236.

3 *Addaita Bhuia* v. *Kali Das De*, (1907) 12 C. W. N. 96.

4 *Lilla Singh*, (1894) 22 Cal. 286; *Abdul Gafur*, (1896) 23 Cal. 896; *Himayat Ali*, (1904) P. R. No. 10 of 1905; *Jaswant Singh*, (1924) 1 Lah. C. 429.

5 *Baroda Kant Pramanick*, (1896) 1 C. W. N. 74.

6 *Pukot Kotu*, (1896) 19 Mad. 349; *Poomalai Udayan*, (1898) 21 Mad. 296; *Madharu Bhonjo Santos*, (1916) 31 M. L. J. 305; *Janki Prasad*, (1886) 8 All. 293.

7 *Doman Mahto*, (1919) 21 Cr. L. J. 193.

8 *Vyankatrav Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Bhawoo Jivaji* v. *Mulji Dayal*, (1888) 12 Bom. 377.

9 *Vyankatrav Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Padarath*, (1882) 2 A. W. N. 233; *Todd*, (1882) 2 A. W. N. 52.

10 *Tulsiram*, (1888) 13 Bom. 168.

11 *Shivdas Omkar Marwadi*, (1912) 15 Bom. L. R. 315, 2 Bom. Cr. C. 66; *Kadarbhai*, (1927) 29 Bom. L. R. 987, 9 Bom. Cr. C. 125, 51 Bom. 896.

a notification which levied duty on all timber brought into East Khandesh from the Indore State went to the accused's timber yard, demanded the payment of duty, and proceeded to search for the dutiable timber in the yard The accused refused to pay the duty and did not allow the Ranger to search for or remove the timber On a prosecution of the accused for an offence under this section it was held that, as neither s 39 of the Forest Act nor the notification thereunder sufficed to make any duty leviable in respect of the timber which the accused had purchased [illegible]

one and the public servant who executes the order or warrant must be clothed with lawful authority under the order or warrant to excute it See cases noted below

Civil process —The resistance to a process of a civil Court is punishable under this section[2]

Statutory application —See the Land Customs on Foreign Frontiers Act (XXIX of 1857), s 18, the Foreigners Act (III of 1864), s 23 Cattle Diseases Act (Mad Act II of 1886) s 15, the Madras Rivers Conservancy Act (Mad Act VI of 1884) s 19

CASES

Obstruction in the discharge of public functions —The accused s son strayed away from his home He was found at a police out post, some distance from a *thana*, and was sent into the *thana* under the charge of a watchman Near the *thana* the accused met the watchman and claimed his son The watchman told him that he would get his son when the *thana* was reached The accused accompanied the watchman remonstrating and quarrelling with him for not giving up his son On reaching the *thana* the accused refused to allow his son to be taken inside and said that his son was not a thief that he should be taken into the *thana* [illegible]

ment, were proceeding to search a man whom they suspected of possessing cocaine, the accused assaulted first the constable and then the Sub Inspector as a result of which the man escaped and the complainants could not search him The accused was convicted of two offences punishable under s 353 and one offence under this section It was held that the accused was rightly convicted[4] Where the accused in whose room stolen articles were found by a police constable immediately caused the room to be shut and threatened to kill the constable if he removed the articles[5] where the accused seriously obstructed, insulted and jostled a process server in the execution of his duty[6], where the accused caught hold of the scythe and threatened the man who was cutting a portion of his hedge, which was an encroachment under the orders of a Circle Inspector[7], and where the accused snatched away a copper pot which was attached by a revenue peon for recovery of arrears of assessment[8] it was held that the accused were guilty of an offence under this section

1 [illegible]

4 *Thaver Issaji Boree* (1911) 13 Bom L R 635, 1 Bom Cr C 55

5 *Gottumukkula Narayanraju*, (1924) 20 L W 717 [1924] M W N 438

6 *Jatto* (1915) 16 Cr L J 700 (1915) P W R (Cr) No 30 of 1915

7 *Bhaga Mana* (1927) 30 Bom L R 364, 9 Bom Cr C 245, 52 Bom 286

8 *Moreshwar Janardan* (1928) 30 Bom L R 1255 9 Bom Cr C 430

Where a cadastral surveyor, in effecting partition of lands under an order passed by a civil Court under O. XXVI, r. 13, of the Civil Procedure Code, much beyond the period stated in the order, is obstructed and assaulted when proceeding to take measurements, the persons obstructing are guilty of offences punishable under ss. 186 and 353 of the Indian Penal Code. Kemp, J., said: "I think a clear distinction can be drawn between the case where a public servant acts wholly without jurisdiction or on an entirely illegal authority and the case where he may be said under s. 99, I. P. C., to be acting in good faith under colour of his office though that act may not be strictly justifiable by law. Of the former class of cases the decisions in 13 Bom. 168, 15 Bom. L. R. 315, 29 Bom. L. R. 987, 22 Cal. 286, 23 Cal. 896, 21 Cal. 320 and 28 All. 181 are illustrations. Illustrations of the latter kind of cases are to be found in 29 Cal. 417 and 19 Mad. 319"[1].

A search-warrant was addressed to a police-station and was endorsed by the officer in charge of the police-station to a constable who, when executing the warrant, was obstructed by the accused. The latter were tried for an offence under this section, and were convicted. Neither at the time of the search nor during their trial did they take any objection to the legality of the warrant. In revision it was urged that the warrant was *illegal inasmuch as* it was *addressed to a police-station* and not to any police-officer by name or by description. It was held that no objection to the legality of the warrant having been taken at the time of the search or at the trial, the conviction could not be set aside on that ground, which was merely an *ex post facto* attempt at justification[2].

A very curious case came before the High Court in England. Certain constables were on duty observing and timing the speed of motor cars driven along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. For that purpose they had measured a certain distance along the road. The accused warned the drivers of cars which were approaching the measured distance of the presence of the constables and the purpose for which they were there. There was evidence that at the time the warning was given the cars were being driven at an illegal speed, and the drivers upon receipt of the warning slackened their speed and proceeded over the measured distance at a lawful speed, whereby the constables, as the accused intended, were prevented from obtaining such evidence as would be accepted as sufficient in a Police Court that the drivers of the cars were committing an offence. It was held that the accused had wilfully obstructed the constables in the execution of their duty within the meaning of the Prevention of Crimes Amendment Acts[3].

Rescuing from custody.—Where two peons of a Court arrested the accused and while they were bringing him towards the Court, he called for help and four persons came and rescued him from the custody of the peons, it was held that they were guilty of an offence under this section, and the accused, of abetting the same[4].

Illegal attachments.—Where a person resisted an officer who attached a spade and a bucket, protected from attachment by s. 94 of the Local Boards Act (Mad. Act V of 1884), it was held that that circumstance did not justify the resistance. The act, however irregular or illegal it might have been, was the act of a public servant acting in good faith under the colour of his office, and against such an act the accused had no right of self-defence[5]. Where the accused was prosecuted under this section for releasing certain buffaloes attached by civil Court peons under defective warrants, it was held that they were not guilty under this section as the peons

1 *Samsuddin Chandasaheb Peerjade.* Criminal Appeal No. 562 of 1928, decided by Kemp and Baker, JJ., on May 10, 1929 (Unrep. Bom.)

2 *Ma Kin,* (1924) 26 Cr. L. J. 845.

3 *Betts* v. *Stevens,* [1910] 1 K. B. 1.

4 *Sheo Progash Tewari* v. *Bhoop Narain Prosad Pathak,* (1895) 22 Cal. 759; *Dharam Chand Lal,* (1895) 22 Cal. 596.

5 *Poomalai Udayan,* (1898) 21 Mad. 296; *Ramayya,* (1889) 13 Mad. 148; *Pukot Kotu,* (1896) 19 Mad. 349.

were not lawfully executing the warrants[1] Attachment made under a writ which

unsealed writ of attachment attached a bullock and calf belonging to the judgment debtor the latter being absent at the time and the judgment-debtor subsequently followed and obstructed the peon and others who were with him and rescued the cattle after attacking the identifier it was held that he was not guilty of an offence under this section[3] When the date fixed in a warrant of attachment has expired the warrant is no longer in force and capable of execution and if any person offers resistance to execution purporting to be made under the time expired warrant he is not guilty of this offence[4] Resistance by a judgment debtor to attachment process issued for service at a place beyond the jurisdiction of the Court is not punishable under this section[5]

No obstruction if no overt act done or physical means used —Persuasion addressed to a tenant not to pay rents to a Receiver in the absence of such Receiver was held not to constitute an obstruction to the Receiver within the

A person refusing to accompany a measuring clerk employed in the Revenue Survey Department to his house and permit it to be measured[8] a person forbidding a Survey Measurer to measure land in a particular manner without using or threatening to use force to prevent him from so doing[9] a person chaining from within the door of his house at the approach of a clerk charged with the execution of a warrant to attach his moveable property[10] a person escaping from lawful custody[11] a person escaping from the custody of a process server and shutting himself up in a room[12] a cart owner refusing to give his cart on hire to a Government officer[13]

a Municipality there was a bona fide dispute as to the ownership of a road and who pulled up pegs and cut strings put down to mark out the road in the assertion of his right[17] a person obstructing municipal servants from removing bales from a strip of land regarding which there was a bona fide dispute of ownership[18] a person merely posting up placards asserting a title to property about to be auctioned by a public servant[19] and a person objecting to the search of his house without using force or threatening language[20] were held to have committed no offence under this section

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13 But see *Durga Kumar De v Samadur Raja Chaudhuri* (19?1) ?? Cr L J 343

H C

9 *Pa y* (1888) Cr R No 27 of 1888 Unrep Cr C 3 7

10 *Ma na* (1888) Cr R No 0 of 1888 Unrep Cr C 407

11 *Poshu b n Dh nbaji Pat l* (186?) ? B H C 1?8

Ch lla Kona ya (1884) 1 Weir 132

16 *Anandappa Nadan* (1884) 1 Weir 1 0

17 *Sagan* (1888) Cr R No 13 of 1888 Unrep Cr C 36? followed in *Sh das Omkar Marwad* (191?) 15 Bom L R 31? 2 Bom Cr C 66 *Agora Mavsi* (1885) 1 Weir 13?

18 *Sh das Omkar Marwad* (191?) 15 Bom L P 315 ? Bom Cr C 66

19 *Gopal Ra* (1904) P R No 7 of 1905 6 P L R 3 4

20 *Gargappa* (1900) ? Bom L R ?41

A Magistrate, being deputed to reorganize a certain village *panchayat*, proposed, in obedience to orders of the Government, to include thereon a member of the depressed classes. This was resented by one of the *panchas*, who behaved in a very rude manner towards the Magistrate, refused to serve on the *panchayat*, and did his best to dissuade other people from serving on it. It was held that however reprehensible the conduct of the accused might have been, he was at liberty to refuse to serve himself and was within his rights in trying to induce others to refuse to serve, and that he could not be convicted of an offence under this section[1].

Where a *patwari* refused to allow a *kanungo* to go through his books and to check them, it was held that it was only an act of insubordination and was not a criminal act falling within the purview of this section[2].

No obstruction if the order or warrant under which a public servant acts is not legal.—A constable was sent to fetch some persons. The order to attend was not in writing. While the constable was taking two persons with him, P came up and threatened both of them and the constable with the Chief Constable's vengeance and in consequence the two persons refused to accompany the constable who had to go without them. P was convicted of offences under this section and s. 189. It was held that as the order did not conform to the provisions of s. 160 of the Criminal Procedure Code, P was not guilty under this section; but he was guilty of an offence under s. 506 and that there was no reason for interfering with his conviction under s. 189[3]. Where a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police, and in attempting to execute such warrant the police arrested the wrong person, and were assaulted in the attempt, it was held that as the District Magistrate had no authority to issue such warrant the accused were justified in their resistance and that no offence under s. 143 or this section was committed[4]. A person obstructing a public servant executing a warrant of arrest which was not signed by the Magistrate but only bore his initials and the substance of which was not notified to him[5]; a person obstructing an *amin* in the measurement of certain lands for partition, when the *amin* was not acting under the Collector's authority[6]; a person obstructing a public servant executing a warrant which did not bear a date on or before which it was to be executed[7]; and a person obstructing a public servant executing a writ of attachment after the date fixed in the writ[8], were held to have committed no offence under this section.

In a suit filed in a Mamlatdar's Court the plaintiff obtained a decree against the accused for possession of a certain piece of land. When the Mamlatdar proceeded to execute the decree he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute. The Mamlatdar referred the matter to the Collector who ordered a surveyor to execute the decree by dividing the land in dispute and putting the decree-holder in possession of his share. The surveyor in attempting to execute the decree was obstructed by the accused, who was thereupon tried and convicted under this section. It was held that as the Collector had no legal authority to issue the order to the surveyor, the surveyor was not discharging a public function and the accused therefore had not committed any offence under this section[9]. In execution of a decree for restitution of conjugal rights a

1 *Ram Ghulam Singh*, (1925) 47 All. 579.

2 *Keshori Lal*, (1924) 26 Cr. L. J. 597.

3 *Purshotam Vanamali*, (1896) Cr. R. No. 18 of 1896, Unrep. Cr. C. 850.

4 *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320.

5 *Abdul Gafur*, (1896) 23 Cal. 896; *Satish Chandra Rai* v. *Jodu Nandan Singh*, (1899) 26 Cal. 748. Where the warrant of attachment was signed by the Sheristedar "by order" of the Court, it was held to be a good warrant: *Wali Muhammad*, (1920) 3 U. P. L. R. (P.) 41.

6 *Lilla Singh*, (1894) 22 Cal. 286.

7 *Mohini Mohan Banerji*, (1916) 3 P. L. W. 64.

8 *Tannaklal Mandar*, (1920) 1 P. L. T. 654.

9 *Tulsiram*, (1888) 13 Bom. 168. See to the same effect, *Lilla Singh*, (1894) 22 Cal. 286.

warrant was issued directing the executing peon to seize the wife and deliver her bodily to her husband failing which to bring her under arrest before the executing Court The peon seized the woman in execution of the warrant but he was resisted and the woman was snatched away It was held that the warrant the execution of which was resisted was illegal and therefore no offence was committed under this section[1]

Where a person not a party to a decree obstructed the *amin* of the Court in attempting to deliver possession of property decreed, it was held that he was not guilty of an offence under this section Such a person not being a party bound by the decree or execution was entitled to resist being ousted from property in his possession[2]

PRACTICE

Evidence —Prove (1) that the person obstructed is a public servant

(2) That at the time of obstruction he was discharging his public functions

(3) That the accused obstructed him in the same

(4) That he did so voluntarily

Proof of *mala fides* of the person obstructing the public servant is not necessary to sustain a conviction under this section[3]

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily

Complaint —Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[4] It should satisfy the provision of law[5]

187 Whoever, being bound by law to render or furnish assistance[1] to any public servant[2] in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both,

Omission to assist public servant when bound by law to give assistance

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice[3], or of preventing the commission of an offence[4], or of suppressing a riot[5] or affray[6], or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both.

COMMENT

Scope —This section provides, first in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the

[1] *Gahar Mahamed Sarkar* v *Pitamber Das*, (1918) 22 C W N 814

[2] *Murugappa Naicker*, (1924) 21 L W 82

[3] *Karuman* (1894) 1 Weir 134

[4] Criminal Procedure Code, s 195.

[5] *Darkin*, (1928) 29 C [illegible] 645

execution of his public duty intentionally omits to assist; secondly, it provides for the punishment when the assistance is demanded for certain specified purposes[1].

Persons bound to furnish information to public servants are punished under ss. 176 and 177. Persons bound to assist public servants come within the purview of this section. In all these cases a breach of legal obligation on the part of the accused is necessary. For instance, if a person required to attend a search fail to do so without reasonable excuse, he will be guilty under this section[2].

1. 'Bound by law to render or furnish assistance'.—The word 'assistance' referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The assistance must have some direct personal relation to the execution of the duty by the public officer. The word 'assistance' as used here implies that the party who assists is doing something which, in ordinary circumstances, the party assisted can do for himself[3]. The assistance which a private person is bound to render to a public servant in the execution of his duty, must be something definite and specific. See ss. 42, 77 and 128 of the Code of Criminal Procedure as to the assistance which a person is bound to render to a public servant. It would be a good defence (1) that there was no reasonable necessity to call upon the accused to render assistance, or (2) that the accused refused on account of some physical impossibility or lawful excuse[4]. But if the refusal to assist is contrary to any provisions of a statute then the person refusing will be liable under this section. Where a person who was called upon by a Salt Inspector to assist in a search held under s. 103 of the Code of Criminal Procedure refused to do so, it was held that he had committed an offence under this section[5].

No offence if not legally bound to assist.—A person was convicted under this section for refusing, when called by a Forest Guard, to serve as one of a *punch* for the purpose of drawing up a *punchnama* with reference to certain wood alleged to have been illegally cut in a reserved forest. It was held that the conviction was illegal, as he was not legally bound to assist the Forest Guard under the Indian Forest Act, (VII of 1878), s. 78[6]. A Magistrate directed a landholder to find a clue in a case of theft within fifteen days and to assist the police. It was held that as such order was not authorized under ss. 90 and 91 of Act X of 1872, the landholder could not be convicted under this section[7].

The accused refused to assist a Police Constable, who wished to bury the dead body of a man who had died of cholera leaving no relations, and threatened to punish any one who did so. It was held that as they were not bound to assist the constable they were not liable[8].

Unreasonable demand for assistance.—Where a police-officer called upon the accused to assist him in arresting certain persons who were supposed to be dacoits and hiding in a forest tract in his district and whose whereabouts were not known and the accused declined to help him, it was held that the accused were not guilty of an offence under this section[9].

2. 'Public servant'.—See s. 21, *supra*.

3. 'Court of justice'.—See s. 20, *supra*.

4. 'Offence'.—Anything punishable under the Code or any special or local law (s. 40).

1 *Ramaya Naika*, (1903) 26 Mad. 419, 420, F.B.
2 *Nga Hat*, (1898) P. J. L. B. 406.
3 *Ramaya Naika*, sup.
4 *Brown*, (1841) Car. & M. 314.
5 *Ippili Magatha*, (1923] M. W. N. 110, 38 M. L. J. 27.
6 *Babaji*, (1897) 22 Bom. 769.
7 *Bakhshi Ram*, (1880) 3 All. 201. See *Kali Prosunna Ghose*, (1881) 7 C. L. R. 575.
8 *Daulat Sing* v. *Bapu*, (1882) 6 C. P. L. R. (Cr.) 5.
9 *Joti Prasad*, (192[illegible]) 42 All. 314.

5 **'Riot'** —See s 146 *supra*

6 **'Affray** —See s 156 *supra*

Statutory application —The Indian Census Act IV of 1920, s 4 (2)

PRACTICE

Evidence —Prove (1) that the person requiring assistance is a public servant

(2) That he was then in the execution of his duties

(3) That the accused was legally bound to render or furnish assistance to him

(4) That the accused omitted to give assistance

(5) That he did so intentionally

Or prove (1), (2) and (3) as above and further

(4) That such assistance was required (*a*) for the purpose of executing the process (lawfully issued) of a Court of Justice, or (*b*) to prevent a riot or an affray, or (*c*) to apprehend a person, such person having been charged with an offence or being guilty thereof, or such person having escaped from lawful custody.

(5) That such assistance was demanded of the accused by such public servant who was legally competent to make such demand

(6) That the accused omitted to give assistance

(7) That he omitted to do so intentionally

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency, first or second class—Triable summarily

Complaint —Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[1]

Disobedience to order duly promulgated by public servant

188 Whoever, knowing that[1], by an order promulgated by a public servant[2] lawfully empowered to promulgate such order[3], he is directed to abstain from a certain act, or to take certain order, with certain property in his possession or under his management, disobeys such direction[4],

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed[5], be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both,

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Explanation —It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm

1 Criminal Procedure Code, s 195

ILLUSTRATION.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

COMMENT.

The authors of the Code say:—"We have, to the best of our ability, framed laws against acts which ought to be repressed at all times and places, or at times and places which it is in our power to define. But there are acts which at one time and place are perfectly innocent, and which at another time or place are proper subjects of punishment; nor is it always possible for the legislator to say at what time or at what place such acts ought to be punishable.

"Thus it may happen that a religious procession which is in itself perfectly legal, and which, while it passes through many quarters of a town, is perfectly harmless, cannot without great risk of tumult and outrage be suffered to turn down a particular street inhabited by persons who hold the ceremony in abhorrence, and whose passions are excited by being forced to witness it. Again, there are many Hindoo rites which in Hindoo temples and religious assemblies the law tolerates, but which could not with propriety be exhibited in a place which English gentlemen and ladies were in the habit of frequenting for purposes of exercise. Again, at a particular season hydrophobia may be common among the dogs at a particular place, and it may be highly advisable that all people at that place should keep their dogs strictly confined. Again, there may be a particular place in a town which the people are in the habit of using as a receptacle for filth. In general this practice may do no harm, but an unhealthy season may arrive, when it may be dangerous to the health of the population, and under such circumstances it is evidently desirable that no person should be allowed to add to the nuisance. It is evident that it is utterly impossible for the legislature to mark out the route of all the religious processions in India, to specify all the public walks frequented by English ladies and gentlemen, to foresee in what months and in what places hydrophobia will be common among dogs, or when a particular dunghill may become dangerous to the health of a town. It is equally evident that it would be unjust to punish a person who cannot be proved to have acted with bad intentions for doing to-day what yesterday was a perfectly innocent act, or for doing in one street what it would be perfectly innocent to do in another street, without giving him some notice.

"What we propose, therefore, is to empower the local authorities to forbid acts which these authorities consider as dangerous to the public tranquillity, health, safety or convenience, and to make it an offence in a person to do anything which that person knows to be so forbidden, and which may endanger the public tranquillity, health, safety or convenience. It will be observed that we do not give to the local authorities the power of arbitrarily making anything an offence; for unless the Court before which the person who disobeys the order is tried shall be of opinion that he has done something tending to endanger the public tranquillity, health, safety or convenience, he will be liable to no punishment. The effect of the order of the local authority will be merely to deprive the person who knowingly disobeys the order of the plea that he had no bad intentions. He will not be permitted to allege that if he has caused harm, or risk of harm, it was without his knowledge.

"Thus, if in a town where no order for the chaining up of dogs has been made, A suffers his dog to run about loose, A will be liable to no punishment for any mischief which the animal may do, unless it can be shown that A knew the animal to be dangerous. But if an order for confining dogs has been issued, and if A knew

of that order, it will be no defence for him to allege, and even to prove, that he believed his dog to be perfectly harmless If the Court think that A's disobedience has caused harm, or risk of harm A will be liable to punishment On the other hand, if the Court think that there was no danger, and that the local order was a foolish one, A will not be liable to punishment

"We see some objections to the way in which we have framed this part of the law, but we are unable to frame it better On the one hand, it is, as we have shown, absolutely necessary to have some local rules which shall not require the sanction of the legislature On the other hand, we are sensible that there is the ind vexation from such rules, very excellent and able men ejudicial to the happiness of the people than a meddling disposition Yet, experience shows us that it is a disposition which is often found in company with the best intentions, with great activity and energy, and with a sincere regard for the interest of the community A public servant of more than ordinary zeal and industry unless he have very much more than ordinary judgment, is the very man who is likely to harass the people under his care with needless restrictions We have therefore, thought it necessary to provide that no person should be punished merely for disobeying a local order, unless it be made to appear that the disobedience has been attended with evil, or risk of evil Thus no person will be punished for disobeying an idle and vexatious order"[1]

Ingredients.—The section requires—

1 That there must be an order promulgated by a public servant

2 That the public servant must have been lawfully empowered to promulgate such order

3 That a person having knowledge of such order and directed by such order (*a*) to abstain from a certain act, or (*b*) to take certain order with certain property in his possession or under his management, has disobeyed such direction

4 That such disobedience causes or tends to cause (*i*) obstruction annoyance, or injury, or risk of it, to any person lawfully employed, or (*ii*) danger to human life, health or safety, or (*iii*) a riot or affray

1. 'Whoever, knowing that'.—There must be evidence that the accused had knowledge of the order with the disobedience of which he is charged[2].

2. 'Order promulgated by a public servant'.—Where an order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under the section[3] It is necessary that the order should be directed to the accused[4] But a general order also is quite sufficient[5] Mere proof of a general notification promulgating the order does not satisfy the requirements of this section It is open to the Magistrate, in determining the question of such knowledge, to take into consideration the facts and circumstances of the case including the fact that the accused lived at a place where the order was duly promulgated[6]

If an order is intended to have a temporary operation only, and has expired by efflux of time, and has not been again promulgated, no conviction can be had

[1] Note F, pp 128 129

[2] *Ramdas Singh*, (1926) 54 Cal 152, *Sheik Abdul* (1926) 31 C W N 340 45 C L J 202

[3] *Parbutty Charan Aich*, (1888) 16 Cal 9

[4] *Nobo Kishore Chuckerbutty*, (1880) 7 C L R 291, *Gopal Burnawar*, (1869) 3 Beng L R (A Cr J) 13, *Komul Kisto Bonick*, (1883) 12

[6] *Ramdas Singh*, (1926) 54 Cal

for disobedience to it[1]. Similarly, disobedience to an invalid order is not punishable[2].

Orders under s. 267 of the Indian Succession Act[3]; ss. 133, 136 and 144 of the Code of Criminal Procedure[4]; s. 473 of the City of Bombay Municipal Act[5], etc., are orders under this section.

'Public servant'.—The section only applies when the order has been issued by a public servant[6]. A Receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) is not such a public servant[7].

See s. 21, as to the meaning of 'public servant'.

3. 'Lawfully empowered to promulgate such order'.—If the public servant in question is not lawfully empowered to promulgate the order no conviction can stand[8]. The order must be a proper order and not merely a notice[9]. If the order is both in substance and in its manner of publication illegal, as being beyond the powers conferred by law, the accused will not be liable[10].

4. 'Directed to abstain from a certain act, or to take certain order with certain property in his possession, etc.'—The section applies where a person 'knowing' that an order has been promulgated by proper authorities to do or not to do certain acts disobeys such order[11].

5. 'Such disobedience causes or tends to cause obstruction, annoyance or injury,...etc.'—In *Empress* v. *Habibullah*[12] Mahmood, J., observed: "It is necessary to establish that the disobedience 'causes, or tends to cause, obstruction, annoyance, or injury to any person lawfully employed'; and to make the offence graver, it must be established that 'such disobedience causes, or tends to cause, danger to human life, health, or safety; or causes, or tends to cause, a riot or affray'; and it is clear that if none of these conditions are satisfied the conviction is illegal, and must be set aside. Now, in the first place, it seems clear to me that the 'obstruction, annoyance, or injury' on the one hand, and the 'danger to human life, health, or safety' on the other hand, are intended by the section to be applicable to cases in which the injurious results therein contemplated arise in the ordinary course of lawful employment to persons who, in the exercise of their rights as ordinary citizens, may incur such evil consequences on account of any act or omission of the accused, which act or omission occurs in disobedience of a lawful order. In the next place, I am of opinion that the section has no application to cases in which a person simply neglects his property, and by allowing a wall or a gate-way to remain in a dilapidated condition, renders theft or other crime more easy of commission than would otherwise be the case. The law does not contemplate that the physical barrier of a wall or a gate is the means of restraining persons from crime, and no order of this nature can be made on the mere ground of any

1 *Sheodin*, (1887) 10 All. 115.

2 *Bhoirub Chunder Datta*, (1881) 10 C. L. R. 193; *Bishambar Lal*, (1891) 13 All. 577; *Narayana*, (1889) 12 Mad. 475; *Tekait Kunj Behari Narain Deo* v. *Bhiko Singh*, (1900) 5 C. W. N. 329.

3 XXXIX of 1925.

4 Act V of 1898.

5 Bom. Act III of 1888.

6 Weir (3rd Edn.) 78.

7 *Ebrahim Sircar*, (1901) 29 Cal. 236.

8 *Khandoji bin Tanaji*, (1868) 5 B. H.C. (Cr. C.) 21; *Bhau bin Vitha*, (1867) 3 B. H. C. (Cr. C.) 53; *Tatya*, (1871) Unrep. Cr. C. 50; *Bapuji Bechar*, (1874) Unrep. Cr. C. 81; *Amiraddi*, (1869) 3 Beng. L. R. (A. Cr. J.) 45; *Prosunno Coomar Chatterjee*, (1881) 8 C. L. R. 231; *Ebrahim Sirkar*, sup.; *Bakhshi Ram*, (1880) 3 All. 201; *Jodhi*, (1883) 1 O. D. 108; *Kalian Singh*, (1904) 24 A. W. N. 233; *Dhan Singh*, (1904) 1 A. L. J. 615; *Nagappa Theran*, (1913) 38 Mad. 602; *Ba Nyun*, (1913) 7 B. L. T. 25. See *Raghurath Venaik Dhulekar*, (1924) 47 All. 205, where the Judges differed on the point whether the police had power to promulgate a verbal order to disperse a procession.

9 *Kandhaiya Lal*, (1883) 1 O. D. 115.

10 *Lakhmidas Makandas*, (1889) 14 Bom. 165; *Jasoda Nand*, (1898) 20 All. 501; *Umir*, (1873) P. R. No. 8 of 1873; *Harilal*, (1889) 14 Bom. 180; *Nga Po Tun*, (1895) U. B. R. (1892-1896) 178.

11 *Nandkumar Bose*, (1869) 3 Beng. L. R. App. 149; *Anant Shitaram*, (1899) 1 Bom. L. R. 524.

12 (1886) 6 A. W. N. 251, 252.

such apprehension In this case the accused were in possession of an inn where travellers put up The Magistrate passed an order directing them to repair the gate of the inn within a month as it was apprehended that travellers' property would otherwise be stolen The repairs required by the order were not made till after the expiry of the month and the accused were therefore convicted under this section It was held that the conviction was wrong[1] A conviction in the absence of evidence as to the likely result of the disobedience of an order is bad in law[2] Thus disobedience to an order under s 144 of the Criminal Procedure Code prohibiting a person from holding a market on certain specified days was held not to be punishable in the absence of evidence showing that the disobedience was likely to lead to a breach of the peace[3] The accused were directed not to make any disturbance over a certain person's rights of a ferry and thereafter they being found plying another ferry at the site in question but not causing any disturbance were ordered to be prosecuted under this section It was held that the order for prosecution was infructuous[4] Where proclamation and attachment were issued

joint family to which family cultivated the convicted under this

section[5] But if the act of disobedience hastened to cause annoyance it is sufficient under this section Objectionable language near a liquor shop such as if you drink you will be drinking the blood of your children , speaks for itself and no more evidence than the words used is required[6] The accused sold drink in his shop during a festival day in contravention of an order promulgated by the

r this section It was held that the on or proof of causing or tending to one and as it does not follow as a riots or disturbance[7] Mere refusal to disperse when ordered to do so under s 144, Criminal Procedure Code, does not amount to an offence under this section[8]

Section not applicable to orders made in civil suits —The section applies to orders made by public functionaries for public purposes and not to an order made in a civil suit between party and party[9] The operation of the section is limited to the promulgation by public servants of orders relating to safety, health, or convenience of the public Thus, disobedience to an order issued under O XXI,

[1] *Habibullah* (1886) 6 A W N 251

[2] *Brojo Nath Ghose*, (1900) 4 C W N 226 In this case it was said that although the establishment of a rival *hat* (bazar) at a place near to an old *hat* (bazaar) and held on the same day might lead to the breach of the peace, but that should not alone form a sufficient ground for a conviction The decision seems to give the go bye to the words 'tends to cause'

[3] *Shyamanand Das Paharaj* (1904) 31 Cal 990, *Ram Gopal Daw* (1905) 32 Cal 793, *Parmeshwar Rai* (1922) 3 P L T 268 See

tend to cause annoyance, obstruction, or injury to human life health or safety *Shabuckram Bukoolee* (1865) 2 W R (Cr) 32 where the conviction was set aside for refusal to remove and reconstruct roof drains, *Harilal*, (1889) Unrep Cr C. 433, where a man held a caste feast contrary to orders of a Municipality when cholera was raging in the city

[4] *Sujal Biswas* v *Samiruddin Mandal*, (1917) 22 C W N 599

[5] *Bisi Behari*, (1917) 2 P L W 179

[6] *Govind Venkatesh Yalgi*, (1908) 10 Bom L R 1047

[7] *Yerlagadda Venkanna*, [1925] M W N 396

[8] *Din Mahammad* (1928) 10 Lah 231, *Paramasiva Moopan*, (1927) 29 Cr L J 590, [1928] M W N 70

[9] *Chandrakanta De* (1890) 6 Cal 445, *Uluapagarda* (1896) Unrep Cr C 864 Cr

nand v *Dwarkadas Dharamsi* (1904) 8 Bom

r. 46, Civil Procedure Code, 1908, is not punishable under this section[1]. The proper remedy for disobedience to an order of injunction passed by a civil Court is a committal for contempt[2].

Orders issued under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885) are not of a civil nature as the primary purpose of orders made under s. 69 is to prevent breaches of the peace. Disobedience to such orders is punishable under this section[3]. Disobedience to an order of summary ejectment issued under s. 219 of the Central Provinces Land Revenue Act (II of 1917) is punishable likewise on the ground that it is an order made by a public functionary for a public purpose[4].

Statutory application.—The Indian Telegraphs Act (XIII of 1885), s. 16; the Epidemic Diseases Act (III of 1897), s. 3: the City of Bombay Municipal Act (Bom. Act III of 1888), s. 473: the Bombay Mamlatdars' Courts Act (Bom. Act II of 1906), s. 21: the Calcutta Municipal Act (Beng. Act III of 1899), s. 576.

CASES.

Valid orders.—*An order issued by a Magistrate prohibiting a Zemindar from holding a new market on his estate close to an old established one belonging to a neighbouring zemindar, on the ground that it had caused unlawful assemblies and raised apprehension of a breach of the peace*[5]: *an order to the priests of a temple, much frequented by pilgrims, to widen and heighten the doorway so as to obviate the dangers arising from overcrowding, and improve the ventilation*[6]; an order prohibiting a person from plying a boat for hire at or in the immediate vicinity of a public ferry[7]: an order commanding an assembly of five or more persons to disperse[8]; an order directing the rival owners of two markets not to hold them on certain days, in order to prevent any likelihood of a breach of the peace[9]; and an order not to slaughter cows or bullocks on particular days[10] are held to be valid orders under this section.

An order was issued by a Magistrate prohibiting shouting against drink near liquor shops, and a person shouted from the verandah of a private house abutting on a public place, it was held that he had disobeyed the order, for if a man standing on a private place adjoining a public road shouted into the road words deliberately meant for persons using that road he was as much shouting in a public place as if he stood on the road itself and shouted[11].

Invalid orders.—An order issued by a Magistrate, warning owners of cattle to take proper care of them[12]: an order preventing a house-holder from building a wall to his own house, because it might result in a breach of the peace[13]; an order to remove the banks of a tank in a dry river because they obstructed the current in rainy season[14]: an order to cut down trees because they impeded ventilation[15]; a verbal order under s. 137, Criminal Procedure Code[16]; an order under s. 144, Criminal Procedure Code, prohibiting a person from collecting rents from tenants[17]; a general order under s. 144, Criminal Procedure Code, restraining

1 *Yaung Hon*, (1909) U. B. R. (P.C.) 23.

2 See, however, *Ravji Khandu v. Fraser*, (1906) 8 Bom. L. R. 638.

3 *Lakshan Bor v. Naranarain Hazra*, (1921) 25 C. W. N. 617.

4 *Hirasingh*, (1920) 17 N. L. R. 88.

5 *Bykuntram Shaha Roy*, (1872) 10 Beng. L. R. 434, 18 W. R. (Cr.) 47, F.B.

6 *Ramchandra Eknath*, (1869) 6 B. H. C. (Cr. C.) 36.

7 *Muthra v. Jawahir*, (1877) 1 All. 527.

8 *Tucker, Norman and Thompson*, (1882) 7 Bom. 42.

9 *Lalla Mitterjeet Sing v. Rajcoomar Sircar*, (1872) 18 W. R. (Cr.) 22.

10 *Abdul Ghafur*, (1914) 18 O. C. 70.

11 *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.

12 *Amiraddi*, (1869) 3 Beng. L. R. (A. Cr. J.) 45, 12 W. R. (Cr.) 36.

13 *Kashichunder Doss*, (1873) 10 Beng. L. R. 441.

14 *Gholam Durbesh*, (1868) 10 W. R. (Cr.) 36.

15 *Uttam Chunder v. Ram Chunder*, (1870) 13 W. R. (Cr.) 72.

16 *Janaki Nath Chakravarti v. Jnanendra Nath Chakravarti*, (1914) 16 Cr. L. J. 24.

17 *Prem Chand Singh Roy v. Dharmadas Singh Roy*, (1905) 9 C. W. N. 392.

the holding of a *hat* or market[1], a notice under Mad Act V of 1884 calling upon a person to remove certain encroachments on a public road[2], an order directing that all music should cease when any procession is passing a certain place of worship[3], an order not to place stake nets in a river[4], an order issued by a revenue officer directing certain persons to pay their assessment to a specified individual[5], a notice issued under s 98 (2) of the Madras Local Boards Act (V of 1884) as amended by Act VI of 1900[6], a permit to cut and transport timber issued under ss 26 and 35 of the Forest Act[7], an order under s 146 of the Criminal Procedure Code[8], an order under s 147, Criminal Procedure Code, directing a person to remove a fence so as to allow of the use of an alleged right of way[9], an order prohibiting the use of public roads between 9 P M and sunrise[10], an order which declared that, as between parties to a contention certain land in dispute did not belong to the public[11], an order forbidding the slaughter of cattle or sale of meat within a radius of three miles of a licensed slaughter house[12], an order directing a land owner to find out a clue in a case of theft within fifteen days[13], an order forbidding persons to enter a railway station except for bona fide purposes of travelling[14], and an order directing a station master to detain certain logs supected to be stolen property[15] are held to be not valid orders under this section

Order to be directed to the accused —Where the accused was convicted of disobeying an order posted at a certain place by a Magistrate prohibiting people from burying and burning corpses there, it was held that the order not having been served individually upon the accused the conviction was illegal[16] The proprietor of a theatre, not in actual possession or management of the theatre at a time when a lawful order promulgated by a public servant was disobeyed, was held to have committed no offence under this section[17]

PRACTICE

Evidence.—Prove (1) the promulgation of the order

(2) That it was promulgated by a public servant

(3) That such public servant was lawfully empowered to promulgate the same[18]

(4) That such order directed the accused to abstain from a certain act, or to take certain order, etc

(5) That the accused knew of such direction to him[19]

(6) That he disobeyed such direction

(7) That such disobedience caused, or tended to cause, obstruction, annoyance or injury, or risk of the same to a person lawfully employed, or that such disobedience caused, or tended to cause, danger to human life, health, or safety, or that such disobedience caused, or tended to cause, a riot or an affray[20]

1 *Parmeshwar Rai* (1922) 3 P L T 268
2 *Subramanian*, (1896) 20 Mad 1
3 *Muthialu Chetti* v *Bapun Saib*, (1880) 2 Mad 140, *Sundram Chetti* (1883) 6 Mad 203 F B
4 (1878) 1 Weir 138
5 *Ramachendra Nayako*, (1884) 1 Weir 139
13 *Bakshi Ram*, (1880) 3 All 201
14 *Rama*, (1913) 35 All 136
15 *Bithal Nath*, (1913) 16 O C 371
16 *Sukar Budhia* (1870) Unrep Cr C 30
17 *Krishna Shet*, (1890) Cr R No 59 of 1890, Unrep Cr C 527
18 *Subun Singh*, (1875) 23 W R (Cr) 57, *Nagappa Theván* (1913) 38 Mad 602
19 *Ramtonoo Singh*, (1869) 12 W R (Cr) 49 *Abelakh Lall* v *Sirnam Singh*, (1871) 15 W R (Cr) 50
20 4 M H C App 5 *Anant Shitaram* (1899) 1 Bom L R 524, *Nandkumar Bose*, (1869) 3 Beng L R App 149, *Shabuckram Bukoolee*, (1865) 2 W R (Cr) 32, *Ramtonoo Singh*, sup, *Harilal*, (1889) Unrep Cr C 433, *Brojo Nath Ghose*, (1900) 4 C W N 226, *Shya nanand Das Paharaj*, (1904) 31 Cal 990, *Ram Gopal Daw*, (1905) 32 Cal 793

Procedure.—*Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.*

Where an executive officer makes an order or issues a notification it is not within the province of judicial authority to question the propriety or legality of such order or notification, until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not[1]. A Magistrate is not competent to try and convict a person under this section of disobedience to an order issued by himself as Magistrate under s. 144, Criminal Procedure Code[2].

Order under appeal.—A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order the legality of which is then under the consideration of an appellate Court[3].

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required[4]. A prosecution under this section should not be launched unless all the elements necessary for a conviction are present[5]. The complaint for an alleged disobedience of an order under s. 144, Criminal Procedure Code, must show that the disobedience caused, or tended to cause, obstruction, annoyance or injury or a riot. Whether a complaint in writing is necessary where an order is promulgated by Government is open to question. Under the old s. 195 of the Criminal Procedure Code it was held that where the order was not promulgated by any public servant but by Government. no sanction was required as a condition precedent to prosecution for disobeying the order[6].

Punishment.—Rigorous imprisonment can only be inflicted if the case comes within the latter part of the section[7].

Threat of injury to public servant.

189. Whoever holds out any threat of injury[1] to any public servant[2], or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servants, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Section 503 defines criminal intimidation. That section is general in its character: whereas this section deals with criminal intimidation of a public servant.

Under this section there must be 'a threat of injury either to the public servant or to any one in whom he (the accused) believes that public servant to be interested'. What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest[8]. Where the accused more than once, and in a loud tone, said to the Magistrate and other police-officers that he and others would obstruct the carrying of a Hindu God along the

1 *Surjanarain Dass*, (1880) 6 Cal. 88.
2 *Langadaya Balu Koli*, (1897) Unrep. Cr. C. 904, Cr. R. No. 14 of 1897.
3 *Dalsukram Haribhai*, (1866) 2 B. H. C. 384.
4 Criminal Procedure Code, s. 195.
5 *Parmeshwar Rai*, (1922) 3 P. L. T. 268.
6 *South*, (1900) 24 Mad. 70.
7 *Ratanrav Mahadevrav Chavan*, (1866) 3 B. H. C. (Cr. C.) 32.
8 *Amirkhan*, (1886) Unrep. Cr. C. 273; *Projapat Jha*, (1909) 14 C. W. N. 234; *Kuppusami Aiyar*, (1915) 28 M. L. J. 505.

road, even though a riot might take place, it was held that he was guilty of an offence under this section[1] It is essential to prove the exact words used by the accused in threatening the public servant in order to enable the Court to ascertain whether in fact a threat of injury to the public servant was really made by the accused[2].

Mere empty threats, which are often effusions of passion unattended with any formal intention of wrong, should be distinguished from threats really calculated to cause the person to whom they are held out to be in fear of the injury threatened[3] Where the endorsement on a summons was to the effect that after tender of the summons to the witness, the accused, the son of the witness, and the owner of the house came up, abused the process server and asked him to get out of the house and that the witness immediately after received the summons and *batta* and signed his name, it was held that no offence was committed[4] Where a person arrested in execution of a decree refused to follow the peon who arrested him, and shreatened to use violence, it was held that he was guilty of an offence under this tection[5]

1. 'Injury'.—See s 44, *supra* "Injury" implies an illegal harm and the mere threat to bring a legal complaint either before a Court or before a public servant s superior is no "injury" A police constable stopped a motor car travelling at night without lights During an altercation which took place between the driver and the constable the accused came up and told the driver to bring a complaint against the constable, in which he himself would be pleased to give evidence on behalf of the driver It was held that the accused was not guilty of an offence under this section[6]

2 'Public servant'.—See s 21 *supra*

PRACTICE

Evidence.—Prove (1) that the accused held out the threat

(2) That such threat was of injury

(3) That the person threatened was a public servant or some person in whom the accused believed such public servant was interested

(4) That the purpose for which such threat was held out was to induce such public servant to do, or to forbear, or delay to do any act connected with the exercise of his public functions

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, held out threat of injury to a public servant, to wit——, [*or* to——in whom you believed that a public servant to wit——, was interested] for the purpose of inducing that public servant to do an act, to wit——, [*or* to forbear or delay to do——] connected with the exercise of the public functions of such public servant and thereby committed an offence punishable under s 189 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

1 *Amirkhan*, (1886) Unr p Cr C 273, *Projapat Jha*, (1909) 14 C W N 234
2 *Maheshri Bakhsh Singh*, (1886) 8 All 380
3 2nd Rep, s 123
4 *Kuppusami Aiyer*, (1915) 28 M L J 505
5 *Jagarnath Singh*, (1924) 25 Cr L J 1237
6 *Shahdad*, (1925) 6 Lah 558

190. Whoever holds out any threat[1] of injury[2] to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant[3] legally empowered, as such, to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Threat of injury to induce person to refrain from applying for protection to public servant.

COMMENT.

The object of this section is to prevent persons from terrorising over others with a view to induce them to desist from seeking the protection of public servants for any injury. Where a clergyman knowing that a civil suit was pending against a *person for the possession of certain church property, excommunicated him for* withholding it, it was held that the clergyman had committed an offence under this section[1].

1. **'Threat'.**—See s. 189, *supra.*

2. **'Injury'.**—See s. 44, *supra.* The threat of the institution of a civil suit for a mere declaration of right against any person who was objecting to that right was held to be not a harm illegally caused to that person in body, mind, reputation or property[2].

3. **Public servant'.**—See s. 21, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused held out the threat.

(2) That such threat was of an injury.

(3) That the purpose for which such threat was held out was to induce the person threatened to refrain or desist from making a legal application for protection against some injury.

(4) That the person to whom such legal application was about to be made was a public servant.

(5) That such public servant was legally empowered, as such, to give the protection, or to cause the same to be given.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, held out a threat of injury, to wit——, to——, for the purpose of inducing him to refrain or desist from making a legal application for protection against such injury to a public servant legally empowered to give such protection (*or* to cause such protection) to be given, and thereby committed an offence punishable under s. 190 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

1 *De Cruz*, (1884) 8 Mad. 140. 2 *Mulai Rai*, (1925) 24 A. L. J. 314.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

THE Code treats the giving and the fabricating of false evidence in exactly the same way, and marks the grades of those offences on the principle that the law ought to make a distinction between the kind of false evidence which produces great evils and the kind of false evidence which produces comparatively slight evils As plaints and written statements are verified by the civil suitors who present them, the Code renders punishable the deliberate assertion of falsehoods in pleadings[1]

Giving false evidence

191 Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject[1], makes any statement which is false[2], and which he either knows or believes to be false, or does not believe to be true[3], is said to give false evidence

Explanation 1 —A statement is within the meaning of this section, whether it is made verbally or otherwise

Explanation 2 —A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

ILLUSTRATIONS

(*a*) A, in support of a just claim which B has against Z for one thousand rupees falsely swears on a trial that he heard Z admit the justice of B's claim A has given false evidence

(*b*) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z Here A states that which he knows to be false, and therefore gives false evidence

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z, A in good faith believing it to be so Here A's statement is merely as to belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject A gives false evidence whether Z was at that place on the day named or not

(*e*) A an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation A has given false evidence

[1] Stokes Anglo Indian Codes, Vol I, p 30

COMMENT.

The offence of giving false evidence is known as 'perjury' under the English law.

Scope.—The words of this section are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly knowing it to be false and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true[1].

English law.—According to common law a statement on oath or affirmation, to amount to perjury, must be—(1) taken in a judicial proceeding; (2) taken before a competent tribunal; (3) material to the question; (4) false; (5) known by the witness to be false or not known to be true. The law relating to perjury is consolidated by 1 & 2 Geo. V., c. 6.

Difference between Indian and English law.—(1) According to common law the false statement must have reference to some judicial proceeding: and the false evidence must be given before a competent tribunal. In the Code this distinction only exists in reference to the degree of punishment imposed[2].

(2) According to common law perjury must be proved by two witnesses, or by one witness with proof of other material and relevant facts substantially confirming his testimony. Under the Penal Code no particular number of witnesses in any case is required to prove any fact.

(3) The common law requires that the matter sworn to must be material to the cause depending in the Court. According to the Penal Code it is not necessary that the statement should be material, but that would be considered in awarding punishment[3].

(4) In England, an oath, or an affirmation rendered equivalent to it by law, is an essential element of the offence. It is immaterial whether the fact which is sworn to be in itself true or false. In India, an oath is merely one of the forms by which a party may be bound to speak the truth. Even if an oath were improperly administered by an incompetent person, still the offence would be committed, if the party giving the false evidence were bound by an 'express provision of law to state the truth'.

Ingredients.—The offence under this section involves three ingredients:—

1. A person must be legally bound (*a*) by an oath, or any express provision of law, to state the truth, or (*b*) to make a declaration upon any subject;
2. he must make a false statement; and
3. he must know or believe it to be false, or must not believe it to be true.

1. 'Legally bound by an oath or by any express provision of law to state the truth...or to make a declaration upon any subject'.—It is necessary that the accused should be legally bound by an oath before a competent authority. If the Court has no authority to administer an oath to a witness the proceeding will be *coram non judice* and a prosecution for false evidence will not stand[4]. Section 4 of the Indian Oaths Act of 1873 specifies the Courts and persons who have authority to administer oaths and affirmations. Section 5 enumerates the persons by whom oaths or affirmations must be made.

1 *Mahomed Hossain*, (1871) 16 W. R. (Cr.) 37.

2 See per Jenkins, C. J., in *Bal Gangadhar Tilak*, (1904) 6 Bom. L. R. 324, 326.

3 See *Babu Ram*, (1904) 26 All. 509.

4 *Adbul Majid* v. *Krishna Lal Nag*, (1893) 20 Cal. 724; *Iswar Chunder Guho*, (1887) 14 Cal. 653; *Radhika Mohan Kuri* v. *Lal Mohan Sha*, (1893) 20 Cal. 719; *Mata Dayal*, (1897) 24 Cal. 755; *Chota Jadub Chunder*, (1864) W. R. (Gap No.) (Cr.) 15; *Niaz Ali*, (1882) 5 All. 17; *Kandhaiya Lal*, (1899) 19 A. W. N. 87; *Luxumandas*, (1869) Unrep. Cr. C. 25; *Jibhai Vaja*, (1874) 11 B. H. C. 11; *Falleh Ali*, (1894) P. R. No. 15 of 1894.

[illegible] cannot be [illegible] on a foreign affidavit [illegible] English law[1] There [illegible] n offence to give false evidence before a Court in a Native State where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court[2]

Want of jurisdiction.—If the Court administering the oath is acting beyond its jurisdiction a conviction will not be sustained[3] The test of jurisdiction is [illegible] when asked to [illegible] of an employee [illegible] District Judge by false witnesses, under an oath, the Judge having no authority to administer it[6], a Native Christian giving false evidence, though solemnly affirmed under Act V of 1840, the Act not being applicable to him, but only to Hindus and Mahomedans[7], a person making a false statement before a person purporting to act under the Registration Act but not legally authorized to do so[8], a person making a false statement in an application for a new trial[9]; or in a verified petition presented under s 19 of the Income tax Act to a Tahsildar, who was not an officer competent to receive such a petition[10], and a person making false accounts with the intention of producing them before a Forest Officer not empowered by law to hold an investigation[11], were held to have committed no offence under this section

By an oath.—An oath or solemn affirmation is not a *sine qua non* to the offence of giving false evidence[12]. The offence may be committed although the person giving evidence has neither been sworn nor affirmed[13] By s 14 of the Oaths Act[14] every person giving evidence on any subject, before any Court, is bound to state the truth The idea of the oath, namely, that the person swearing renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth the idea of binding the conscience of the witness which still prevails in England and which in former time led to the swearing of Hindus on the Tulsi and Ganges water, and of Mahomedans on the Koran, finds no place in the Oaths Act The superstitious or religious sanction has been disregarded and the legal sanction alone is relied upon See s 51, *supra*, for the definition of 'oath'

'Any express provision of law'.—Under this clause sanction of an oath is not necessary, but there must be a specific provision of law compelling a person to state the truth It must be proved that the false statement was made under the sanction of law[15] Where the accused is not bound by an express provision of law to state the truth he cannot be charged for giving false evidence Thus, where a person after acquittal was examined on oath to enable the Court to take cogni

1 *Musgrave* v *Medex* (1816) 19 Ves Jun 652

2 *Rambharthi Hirabharthi*, (1923) 47 Bom 907 25 Bom L R 772, 7 Bom Cr C 78

3 *Chait Ram*, (1883) 6 All 103, *Bharma* [illegible]

4 *Kona Subba Chetti*, (1883) 6 Mad 252

5 *Chait Ram*, sup

7 *Vedamuttu* (1868) 4 M H C 185

8 *Radhika Mohan Kuri* v *Lal Mohan Sha* (1893) 20 Cal 719

9 *Haran Mandal*, (1868) 2 Beng L R (A Cr J) 1

10 *Mooneppa Oodian*, *Subbroya Oodian*, (1870) 5 M H C 326

11 *Ramajirav Jivbajirai*, (1875) 12 B H C 1

12 (1865) 3 W R Cr L 10 [illegible]

zance of an offence under s. 190 (*c*), Criminal Procedure Code, it was held that though the Magistrate might examine the person for that purpose, yet he could not examine him on oath under the Oaths Act, as he was not a witness in any case at the time, and that he was not legally bound to state the truth[1]. The law does not require a petition for substitution of parties to be verified, and, therefore, the person who presents to a court a verified petition for substitution containing a false statement of the death of the defendant, is not guilty of giving false evidence[2]. Intentional omission to make statements required by s. 235 of the Code of Civil Procedure amounts to an offence under s. 193[3].

Criminal Procedure Code, s. 161.—Under s. 161, cl. (2), of the Criminal Procedure Code, 1898, which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a police-officer, and he will not be liable to be prosecuted for giving false evidence[4]. The Code of 1882 contained the word 'truly' after the word 'question' in this clause, but this word has been omitted in the present Code[5].

A statement made to an investigating police-officer under s. 161 and recorded by him under the provisions of s. 162 of the Criminal Procedure Code cannot be made the foundation of an order for prosecution under s. 193 of the Penal Code of the person making it[6]. But it is submitted that a person making such a statement may come within s. 203 of the Penal Code.

'Declaration upon any subject'.—In certain cases the law requires a declaration from a person of verification in a pleading—and if such declaration is made falsely it will come under this clause. The words "any subject" denote that the declaration must be in connection with a subject regarding which it was to be made. If a judgment-creditor knowing that something has been paid on his decree verifies an execution application for the full amount, he intentionally declares that to be true which he knows to be false and has committed an offence under s. 193. It is immaterial whether the accused does or does not intend to defraud the judgment-debtor, for the offence is one against public justice and it is with a view to secure more orderly administration of justice that the law makes penal the deliberate assertions of falsehood in pleadings[7].

'Any statement'.—It is not necessary that the false evidence should be material to the case in which it is given[8]. "The framers of the Code used the word 'material', where it was intended to be an essential of the offence, and advisedly omitted it when such was not their intention...I do not say that the question of materiality may not be matter for the consideration of the jury. For the giving of false evidence, to come within section 193, must be an intentional giving; and in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner"[9]. Where the act giving rise to the indictment occurs out of Court then materiality is made essential to the offence, and must accordingly be averred in the indictment,

1 *Hari Charan Singh*, (1900) 27 Cal. 455.

2 *Purendar Jha* v. *Nunulal Jha*, (1926) 6 Pat. 184.

3 *Bapuji Dayaram*, (1886) 10 Bom. 288; *Paupayya* v. *Narasannah*, (1880) 2 Mad. 216.

4 *Kasim Khan: Mussamut Dahia*, (1881) 7 Cal. 121, F.B.

5 The following cases decided when the Code of 1882 was in force are no longer of any authority: *Parshram Raysingh*, (1883) 8 Bom. 216; *Ismal valad Fataru*, (1887) 11 Bom. 659; *Nathu Sheikh*, (1884) 10 Cal. 405; *Baikanta Bauri*, (1889) 16 Cal. 349; *Bhagwantia*, (1892) 15 All. 11; *Bhajan*, (1893) 13 A. W. N. 124.

6 *Muhammad Usman*, (1908) 28 A. W. N. 22.

7 *Hakikatsingh*, (1913) 7 S. L. R. 25.

8 *Parbutty Churn Sircar*, (1866) 6 W. R. (Cr.) 84; *Shib Prosad Giri*, (1873) 19 W. R. (Cr.) 69; *Damodar Ramchandra Kulkarni*, (1868) 5 B. H. C. (Cr. C.) 68.

9 Per Scotland, C. J., in *Aidrus Sahib*, (1862) 1 M. H. C. 38, 41, 42.

e g ss 197 198 199 and 200 If the act occurs in the face of the Court then materiality is not made essential and need not therefore be averred Cases may arise in which materiality may not be essential to the offence but it must be taken into consideration in arriving at the intention with which the false statement was made[1]

2 'Makes any statement which is false' —It must be shown that the statement said to have been false could not but be false It is not sufficient to show that the probabilities are that the statement was false[2] The accused stated on oath that he wrote a certain document Another person swore that he and not the accused had written the document The handwriting expert gave his opinion [illegible]

[illegible]

s 193 could not stand[3] Where the accused was prosecuted for having falsely stated in a civil suit that certain promissory notes which had been executed by him were without consideration it was held that the rule of law enacted by s 118 of the Negotiable Instruments Act and creating a presumption that a promissory note was for consideration would not necessarily apply to a criminal trial and that it was necessary for the prosecution to prove that the promissory notes were for consideration and not for the accused to prove the contrary[4]

Direct proof of the falsity of the statement on which the perjury is assigned is essential But as legitimate evidence for this purpose the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged although not made on oath Such a statement when satisfactorily proved is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground —that it is an admission of the accused person inconsistent with his innocence[5]

See the heading Nature of proof in the Commentary on s 193

3 'Which he either knows or believes to be false or does not believe to be true' —The false evidence must be intentionally false to the knowledge or belief of the person giving it[6] The matter sworn to must be either false in fact or if true the accused must not have known it to be so[7] A man may be guilty of this offence if he swear that he believes or thinks a fact to be true when it is not[8] The false statement for which the accused is charged must be literally false If the statement of fact is literally true but owing to suppression of certain other facts leads to a wrong inference the accused cannot be convicted[9]

It is a false statement made under a verification that constitutes an offence and not a verification on oath or by solemn affirmation[10]

Does not believe to be true —The making of a false statement without knowledge as to whether the subject matter of the statement is false or not is legally a giving of false evidence[11] Where a man swears to a particular fact without knowing at the time whether the fact be true or false it is as much a perjury as if he knew the fact to be false and equally indictable[12] But a man cannot be convicted of perjury for having acted rashly and credulously and having failed to

[1] Tookaram (1862) Unrep Cr C 2 [illegible]
[illegible] N 1099
1 Pat
[3] [illegible] Gupta (19[illegible]3) 1 Ran [illegible]30
[4] Sakhawat Haidar (1920) 18 A L J 1151
5 [illegible]
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make reasonable enquiry with regard to the facts alleged by him to be true. It must be found that he made some statement which he knew or believed to be false or which he did not believe to be true[1].

Written statements.—A person filing a written statement in a suit is bound by law to state the truth and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence[2]. A mere assertion in a pleading contrary to fact, but merely made for the purpose of puting a plaintiff to proof of his case, cannot be made the subject of a prosecution in a criminal Court. But a litigant in making allegations as to material and substantial facts which go to support his claim as a plaintiff, on the one hand, or to meet a claim against him as a defendant on the other, is bound to truly state them, and if he does do so, and if it can be shown that he has intentionally asserted things which are false to his knowledge, he is within the scope of this section. The very essence of crimes of this kind is not how they may injure this or that party to the litigation, but how they may deceive and mislead the Court, and thus produce the most mischievous consequences to the administration of civil and criminal justice.

The verification of an application, in which the applicant makes a false statement, does not subject him to punishment for this offence, if such application does not require verification[3].

Criminating statement is no justification.—When a party makes a false statement while legally bound by solemn affirmation, the fact that the statement was one tending to criminate himself will not justify his acquittal on a charge of giving false evidence[4].

Illegality of trial does not purge perjury.—The fact that the trial in which false evidence is given is to be commenced *de novo* owing to irregularity does not exonerate the person giving false evidence in that trial from the obligation to speak the truth, and he is liable for giving false evidence[5]. But in a Bombay case the proceedings in the trial at which false evidence was given were subsequently annulled in consequence of the sanction for the prosecution being insufficient and the High Court held that the conviction of the accused must be reversed as the false statement was not made in a stage of a judicial proceeding[6].

Non-liability of the accused for giving false evidence.—The authors of the Code say: "We have no punishment for false evidence given by a person when on his trial for an offence, though we conceive that such a person ought to be interrogated. . .If A stabs Z, and afterwards on his trial denies that he stabbed Z, we do not propose to punish A as a giver of false evidence"[7]. The accused shall not render himself liable to punishment by refusing to answer questions put by the Court or by giving false answers to them[8]. He cannot be charged either with giving or fabricating false evidence with the sole object of diverting suspicion from himself and concealing his guilt in regard to a crime with which he is charged[9].

Abetment.—There can be no offence of the abetment of giving false evidence unless the person charged with abetment intended, not only that the statement should be made, but that the statement should be made falsely[10].

1 *Mahammad Ishaq*, (1914) 36 All. 362.
2 *Mehrban Singh*, (1884) 6 All. 626; *Murughandi*, (1891) 1 Weir 154.
3 *Kartick Chunder Holdar*, (1868) 9 W. R. (Cr.) 58; *Haran Mundul*, (1868) 10 W. R. (Cr.) 31; *Juggut Chunder Mozumdar v. Kasi Chunder Mozumdar*, (1880) 6 Cal. 440; *Ganeshi*, (1905) 25 A. W. N. 52.
4 (1867) 3 M. H. C. App. xxxix.
5 *Virasami*, (1896) 19 Mad. 375; *Batesar Mandal*, (1884) 10 Cal. 604.
6 *Raiji valad Taju*, (1871) 8 B. H. C. (Cr. C.) 37.
7 Note G, p. 131.
8 Criminal Procedure Code, s. 342 (2).
9 *Ram Khilawan*, (1906) 29 All. 705.
10 *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

Where an accused asked a witness to suppress certain facts in giving his evidence against him (accused), it was held that he was guilty of abetment of giving false evidence in a stage of a judicial proceeding[1] Similarly, where a person instigated the complainant and witness ... he himself knew to be false, he ... falsely represented himself to be ... T knowing that C was not U, and had not written such document, adduced C as U as the writer of that document, it was held that T was guilty of abetment of giving false evidence[3]

CASES.

False evidence.—A person making a false statement before a Police Patel acting under s 13 of Bom Act VIII of 1867[4], before a Sub Registrar[5], and before a Registrar of Deeds, even though no oath or affirmation be administered to him[6], a witness falsely deposing in another's name[7], a person falsely verifying his plaint[8], a person in an application for execution of a decree intentionally omitting to state an adjustment between the parties after decree whether such adjustment has or has not been previously certified to the Court[9], a person making a false statement on oath before a Magistrate acting under s 164 of the Criminal ...

he cannot, or at least ought not to, be prosecuted under s 193 in respect of statements made therein[15] The Lahore High Court has dissented from this view It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s 342 of the Criminal Procedure Code upon answers to questions put to the accused by the Court[16] Further, it has held that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer, and that such statement can be the subject matter of a charge for perjury[17]

False balance-sheet.—The making of a false balance sheet is not an offence within this section but s 418[18].

1 *Andy Chetty*, (1863) 2 M H C 438
2 *Rawji* (1893) Unrep Cr C 632
3 *Chundi Churn Nauth*, (1867) 8 W R (Cr) 5
4 *Irbasapa* (1880) 4 Bom 479
5 *Juggut Chunder Dutt* (1866) 6 W R (Cr) 81
6 See *Narayanaswamy Iyer*, [1912] M W N 1107

Tevan, (1905) 29 Mad 89
11 *Naloo Patra*, (1910) 38 Cal 368
12 *Shama Churn Roy*, (1867) 8 W R (Cr) 27
16 *Pir Qadir Bakhsh Shah*, (1924) 1 Lah. C. 475
18 *Moss*, (1893) 16 All

False darkhast.—Signing and verifying a darkhast containing false statements is an offence under this section; and it makes no difference that at the time when the signature and verification were appended the darkhast was blank[1].

Evidence under illegal pardon.—Evidence of an accused person illegally pardoned cannot be used against him, or subject him to a prosecution for giving false evidence[2].

Irregular trial.—H, a Police Constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S, upon a charge of "assaulting and obstructing him, H, in the discharge of his duty". Upon such warrant S was arrested and brought before Justices, and was, without objection, tried by them and convicted. H was afterwards indicted for perjury committed on the said trial of S, and convicted. It was held that H was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant[3].

Fabricating false evidence.

192. Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement[1], intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant[2] as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion[3] touching any point material[4] to the result of such proceeding, is said "to fabricate false evidence".

ILLUSTRATIONS.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

COMMENT.

The wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision.

Ingredients.—The offence defined in this section contains the following ingredients:—

1. Causing any circumstance to exist, or making
   (*a*) any false entry in a book or record, or

1 *Ratanchand Dhannram*, (1904) 6 Bom. L. R. 886.

2 *Dala Jiva*, (1885) 10 Bom. 190.

3 *Hughes*, (1879) 4 Q. B. D. 614.

(b) a document containing a false statement.

2 That such circumstance, false entry, or false statement must have been intended to appear in evidence in

(i) a judicial proceeding, or

(ii) a proceeding taken by law before a public servant or an arbitrator

3 That such circumstance, false entry or false statement so appearing in evidence, might cause any person, who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion

4 The formation of opinion should be touching any point material to the result of such proceeding

1. 'Causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement'.—The person accused must be proved to have done any of these things A person commits the offence of fabricating false evidence, if he makes a document which, though it may not contain any false statement in express terms, yet contains false recitals which imply such a false statement[1]

Mere indiscretion in signing a fabricated document without knowing its contents will not render a person liable[2] Intention is the gist of the offence under this section See s 193, *infra*

2. 'That such circumstance, etc, may appear in evidence in a judicial proceeding or in a proceeding before a public servant, etc.'—**Judicial proceeding**—The Code of Criminal Procedure says that 'judicial proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath [s 4 (m)] The power to take evidence on oath, which includes affirmation as well[3], is the characteristic test of 'judicial proceeding'

But the above definition will chiefly apply to cases relating to procedure[4] The expression 'judicial proceeding' has been the subject of the following judicial interpretations —

(1) It means nothing more nor less than a step taken by the Court in the course of the administration of justice in connection with a case pending[5]

(2) An inquiry is judicial if the object of it is to determine a jural relation [illegible] of persons, or between him and the [illegible], acting without such an object in view,

(3) The examination of a complainant in reference to the matter of his petition of complaint is an investigation directed by law, and therefore a stage of a judicial proceeding[7]

(4) An inquiry by Police preliminary to a proceeding before a Court of Justice[8], is a judicial proceeding

(5) An inquiry by a Magistrate before the issue of an order under the [illegible] is a stage of a judicial proceeding

[illegible] 'hapter XIV of the Code of Criminal Procedure

[illegible] y a Court under s. 476 of the Criminal Procedure

[1] *Mohadeo Misser* v *Narayan Ram Sha*, (1905) 10 C. W N 220

[2] *Jai Jai Ram*, (1919) 17 A L J 574

[3] The General Clauses Act (X of 1897), s 3 (36)

[4] *Kassim Khan Mussamut Dahia*, (1881) 7 Cal 121, F B, *Sankaralinga Kone*, (1900) 23 Mad. 544

[5] Per Scotland, C. J, in *Venkatachalam Pillai*, (1864) 2 M H C 43, 46

[6] Per West, J, in *Tulja*, (1887) 12 Bom. 36, 42, *Forbes* v *Ameeroonissa Begum*, (1865) 10 M. I A 340

[7] *Mata Dyal*, (1872) 4 N W P 6

[8] [illegible]

[9]

[10]

[11]

Barn, [illegible] Cal 42, 46 In *Chanan*, (1909) P R No 1 of 1910, execution proceedings are held to be judicial proceedings

Stephen[1] says that a 'judicial proceeding' means a proceeding which takes place in or under the authority of any Court of Justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability.

Cases.—Where the accused was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the Magistrate was right in convicting and punishing the accused for the two separate offences of fabricating false evidence or use in a stage of a judicial proceeding, and of voluntarily assisting in concealing stolen property under s. 414[2]. A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. It was held that his offence fell within this section[3]. Where the date of a document, which would otherwise have not been presented for registration within time, was altered for the purpose of getting it registered, it was held that this offence was committed[4].

One C, whose brother D was an accused person, applied to the Court on behalf of the accused asking that the witnesses for the prosecution might first of all be made to identify D. The Court assenting to his request, C produced before the Court ten or twelve men, none of whom could be identified as D by any of the witnesses. Upon being asked by the Court where D was, C pointed out a man, who was not D. It was held that C was guilty of fabricating false evidence[5].

The accused transferred the whole of his property in favour of his wife, but before registering the sale-deed mortgaged the property to F. The sale deed was, however, registered after the mortgagee had made all necessary enquiry at the Registration Office. After the registration of the sale-deed the mortgage-deed was also registered. The accused was also charged for cheating the mortgagee. It appeared during the trial that the mortgage-deed filed by the complainant bore on it an endorsement of the return of the consideration although there was no such endorsement on it when it was filed in Court. The accused was thereupon further charged for fabricating false evidence, and forgery. It was held that the accused was guilty of fabricating false evidence and cheating, as he must be presumed to know the probable result of his action and it obviously could not have been absent from his mind when he forged the endorsement that he was thereby attempting to defraud the mortgagee of his money[6]. The accused, who was in possession of the complainant's house as a yearly tenant, about the time the tenancy came to an end, prepared another rent-note for a period of four years and got it registered, without the complainant's knowledge. It was held that the accused had committed this offence inasmuch as the rent-note, which contained an admission against the interest of the accused, could be admitted in evidence on his behalf[7]. Where the accused had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered a *kobala* (agreement) in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held that he had acted in furtherance of his desire to secure her person; that, as this could, under the circumstances, be done only by judicial proceedings, his intention was to use the document with its false statements in a judicial proceeding, and thereby to mislead the Court, and that he was therefore guilty of an offence under s. 193[8]. The accused owed money to the complainant

1 Digest of English Criminal Law, Art. 148.
2 *Rameshar Rai*, (1877) 1 All. 379.
3 *Mazhar Husain*, (1883) 5 All. 553.
4 *Mir Ekrar Ali*, (1880) 6 Cal. 482.
5 *Cheda Lal*, (1907) 29 All. 351; *Sur Nath Bhaduri*, (1927) 50 All. 365. Contra, *Durga Prasad*, (1915) 16 Cr. L. J. 667.
6 *Abdul Rashid Khan*, (1913) 12 A. L. J. 104.
7 *Rajaram Bhavanishankar*, (1920) 22 Bom. L. R. 1229, 5 Bom. Cr. C. 262.
8 *Legal Remembrancer* v. *Ahi Lal Mandal*, (1921) 48 Cal. 911.

and sent a registered and insured packet purporting to contain currency notes in settlement of the debt The packet contained waste paper The complainant sued the accused for the debt, and the accused filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowlegedment of the receipt of the packet as collateral evidence in proof of satisfaction It was held that the only offence committed by the accused was an offence punishable under s 193[1].

therein
against
attempt to fabricate false evidence[2].

Abetment—M instigated Z to personate C and to purchase in C's name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed C's name on such paper as the purchaser of it M acted with the intention that such endorsement might be used against C in a judicial proceeding It was held that the offence of fabricating false evidence was actually committed, and that M

ch was never read out to him was held that the act amounted to an indiscretion on his part, and he was not guilty of abetting the fabrication of a false report[4]

Not judicial proceeding.—Where the bailiffs of a Court, twelve in number were always called upon to swear the service of summons in different cases before the Court, and it was the practice to call them all up at the beginning of each day, and to affirm them all at the time solemnly to give true evidence in all cases coming before the Court on that day and one of the bailiffs at a late hour of the day gave false evidence, it was held that he was guilty under s 193 although he was not affirmed to speak the truth in that suit after it was called on for hearing and the names of cases in the day s list were not mentioned when the affirmation was administered[5]

An inquiry by a Magistrate with a view to tracing the writer of an anonymous letter addressed to him, charging certain persons with murder and without any reference to the truth or otherwise of the charge of murder[6], an inquiry by a Magistrate to discover the writer of a scandalous petition[7], a preliminary inquiry by a subordinate Magistrate, under the direction of a District Magistrate, into the circumstances of a complaint against the police[8], the recording of a statement by a third class Magistrate having no authority to carry on the preliminary inquiry in the case[9], and a refere
of a letter for verification[10], wer

The Calcutta High Court
to the trial of a suit are not
has ruled that execution pr
of this section and s 193 It
that the judicial proceedings in which the person intends to use the false evidence must be pending at the date of the fabrication[12] It is enough that there is a reasonable prospect of such a proceeding having regard to the circumstances

1 *Kunju*, (1926) 51 M L J 800, 24 L W 225

2 *Nunda* (1872) 4 N W P 133, *Soondur Putnaick*, (1865) 3 W R (Cr) 59

3 *Mula* (1879) 2 All 105, *Durgacharan Gir*, (1902) 25 All 75

4 *Jai Jai Ram*, (1919) 17 A L J 574

5 *Venkatachalam Pillai*, (1864) 2 M H C 43

6 *Bykunt Nath Banerjee*, (1866) 5 W R (Cr) 72

7 *Jibhai Vaja*, (1874) 11 B H C 11

... Cal 133

12 *Govind Pand* ... 20) ... L R 1239, 5 Bom ... B

of the case and that the fabricated document is intended to be used in such proceeding[1].

'Proceeding...before a public servant'.—As to the definition of 'public servant' see s. 21, *supra.* The provisions of this section are not confined to false evidence to be used in judicial proceedings. It is sufficient if the evidence is to be used to influence a public servant in any proceeding taken by law before him[2]. Where, therefore, the accused, in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate and as to what estates the rents were in arrear, so that he might take steps to enforce payment, it was held that the accused had committed an offence under this section[3]. N, one of the accused, was proposing to sell some property to B. An agreement, dated 23rd May, was written out by N on a stamp paper of Rs. 5. The sale having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. N took advice with regard to this and was told that no refund would be made after two months. N, the other accused, gave him this advice and also told him that he might alter the date in the document from 23rd May to 23rd September. This was unnecessary as the period was six months and not two. It was held that they were guilty of fabricating and abetting the fabrication of false evidence[4]. Where a Patwari was directed by a revenue Court to prepare a written statement, in order to obviate the necessity of taking down his evidence, and he submitted such statement on oath and the statement was proved to be false, it was held that he was guilty of fabricating false evidence[5].

No fabrication if public servant not authorized to hold investigation.—The making up of accounts falsely with the intention of producing them before a Forest Officer not empowered by law to hold an investigation and take evidence does not amount to fabrication of false evidence[6]. If the proceedings in which evidence is given are not judicial proceedings or are *ultra vires,* no offence is committed[7].

The evidence fabricated should be admissible evidence.—If the evidence fabricated is not admissible in evidence then there is no fabrication of false evidence under this section[8]. The soundness of this view is doubted by the Calcutta High Court[9], and the former Chief Court of the Punjab dissented from this view. The latter held that a person was guilty of fabricating false evidence when he made a false entry in a document intending that it should appear in evidence and mislead the Judge or Magistrate and the mere fact that the entry was not legally admissible in evidence could not affect his guilt[10].

Cases.—Where a police-officer, who had suppressed a document, made a false entry in his diary to support his assertion that he had forwarded certain documents, intending that such entry might be used as evidence in his behalf that he had so forwarded the document, it was held that the evidence fabricated must be admissible evidence and as the entry would not be admissible in his behalf, though contrary to his intention, he was not liable[11]. Where a police-officer made a false entry in the special diary relating to a case which was being investigated by him

1 *Rajaram Bhavanishankar,* (1920) 22 Bom. L. R. 1209, 5 Bom. Cr. C. 262.

2 *Ismail Khadirsab,* (1928) 30 Bom. L. R. 330, 333, 9 Bom. Cr. C. 212, 52 Bom. 385.

3 *Juggun Lall,* (1880) 7 C. L. R. 356.

4 *Mohesh Chandra Chaudhuri,* (1915) 28 C. L. J. 213.

5 *Meharban Alikhan* v. *Sita Ram,* [1929] A. L. J. 512.

6 *Ramajirav Jivbajirav,* (1875) 12 B. H. C. 1.

7 *Babu Ram,* (1911) 8 A. L. J. 674; *Phulel,* (1912) 11 A. L. J. 15.

8 *Gauri Shankar,* (1883) 6 All. 42; *Zakir Hussain,* (1898) 21 All. 159; *Chundra Kumar Missir,* (1905) 2 C. L. J. 46; *Dabee Mahto,* (1882) 10 C. L. R. 433; *Keilasum Putter,* (1870) 5 M. H. C. 373.

9 *Mahammad Kazem Ali* v. *Jorabdi Naskar,* (1919) 46 Cal. 986. See also *Baroda Kanta Sarkar,* (1915) 16 Cr. L. J. 620.

10 *Amolak Ram,* (1917) P. W. R. (Cr.) No. 13 of 1918; *Fazl Ahmad,* (1913) P. R. No. 1 of 1914, dissented from.

11 *Gauri Shankar,* (1883) 6 All. 42.

but the document in ie which was admissible in eviden his section[1] Similarly, where a pe to property in a document when such statement was not admissible in evidence against the person or persons against whose interest such statement was made, it was held that he was not guilty[2]

On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife an assignment of perjury in a statement by the accused as a witness for the husband, that he had seen the wife committing adultery (of which he had told the husband), was held bad for immateriality as the supported statement would not be legally relevant to the charge of assault as affording no ground of legal justification[3]

3. 'That such circumstance may cause any person who in such proceeding is to form an opinion to entertain an erroneous opinion.'—The false evidence must lead to the formation of an erroneous opinion If a document does not lead to the forming of an erroneous opinion touching a particular point but leads rather to the forming of a correct opinion, then this offence is not committed[4]

4. 'Touching any point material'.—False evidence under this section should be m 191[5] The word 'mate indirectly, the probabi e credit of any witness tence was improperly anywhere thoroughly settled or debated and therefore shall leave it to every man's own judgment, which, from the consideration of the circumstances of each particular case, may generally, without any great difficulty, discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not '

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury respect of such statements[8] Every question on cross examination of a witness which goes to his credit is material[9] Again, ' if a witness is allowed to give evidence, though it may afterwards turn out that his testimony ought not to have been admitted, perjury may nevertheless be assigned upon his answer. It does not lie in the witness s mouth to say that this evidence was immaterial, especially when if believed, it might most seriously have injured the party against whom it was given"[10].

The evidence fabricated must be 'material'.—*English cases* —The accused had been charged with selling beer without a license, and had falsely sworn that, when previously charged with a similar offence, he had not authorized a plea of guilty to be put in, and that such plea had been put in without his knowledge and against his will It was held that as such statements affected the accused's credit as a witness they were material, and he was rightly convicted of perjury[11] Upon the trial of one S for robbery, the accused, in support of an alibi, swore, first, that

1 *Zakir Husain*, (1898) 21 All 159
2 *Chandra Kumar Misser*, (1905) 2 C L J 46
3 *Tate*, (1871) 12 Cox 7
4 *Badri Prasad* (1917) 40 All 35
5 *Toolaram* (1862) Unrep Cr C 2, *Ganga Sahai* (1902) 23 A W N 68
6 Stephen s Digest, Art 148
7 1 Hawk. P C., c 27, (Perjury), s 8, p 434

S was in a certain house at the time of the robbery; secondly, that S had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact S had been confined in prison during one out of those two years. It was held that the second and third allegations were material as tending to render more credible the truth of the first, and that the accused was rightly convicted of perjury assigned upon them[1]. On the trial of A for perjury, in an affidavit made by him, the signature to the affidavit was proved to be in A's handwriting, but there was no evidence that A was the person who swore to the truth of the affidavit. The defendant was then called as a witness, and swore that the affidavit was used before the taxing master when A was present, and that it was then publicly said that it was A's affidavit. The defendant was then indicted for perjury committed on A's trial, and the indictment alleged that it was a material question on such trial whether A was so present before the taxing master, and whether the affidavit was then used in A's presence, and whether it was then stated publicly that the affidavit was A's. It was held that the above questions were material on the trial of A[2]. The accused was sued for debt under the name of 'Burnard Edward Mullany'. The Judge asked the accused what his name was. He replied 'Edward'. To questions by the plaintiff's attorney the accused denied that his name was 'Burnard', and said that his name was 'Edward' only. The Judge struck out the cause. The accused was indicted for perjury; and it was proved that his real name was 'Burnard', but that he had latterly been known by the name of 'Burnard Edward'. It was held that the Judge having acted upon them, these statements were sufficiently material to sustain a conviction for perjury[3]. In an action by an executrix, for goods sold, she falsely swore on cross-examination that she had never been tried at the Old Bailey and had never been in custody at the Thames Police Station. It was held, on the trial of an indictment for perjury, that this evidence was material[4].

No fabrication if no erroneous opinion could be formed touching any point material to the result of a proceeding.—Where a person produced, as evidence in a suit, a registered deed of sale in which the property sold was wrongly numbered, and which was corrected by himself subsequent to registration[5]; where a Vakil presented a *vakalutnamah* falsely purporting to have been executed before an officer and to bear his signature[6]; where there was a dispute as to the ownership of articles in a box in the accused's house and he made a hole in the wall of the house, and removed the articles he claimed, his object being to make it appear that there had been a theft, but he did not charge anyone with having committed the theft[7]; where a *patwari*, knowing that certain documents were forged, made entries in his papers corresponding to and based on those documents[8]; and where *a kabuliat* was made and signed by the lessees alone with the intention of causing it to be believed that an agreement to let, therein recited, had been made by the agent of the land-owner and with her assent[9], it was held that there was no fabrication. Certain cattle were sold in a market on the 21st of March 1917. A clerk, whose duty it was to register sales of cattle held at that market and give receipts to the purchaser, gave a receipt on the 27th March, most probably, and dated it the 27th March, but subsequently altered the date to the 21st, the actual date of sale. It was held that there was no case of fabricating false evidence, for the alteration of the date was not intended to lead any one to form an erroneous opinion touching the date of sale, but the contrary[10].

1 *Tyson*, (1867) L. R. 1 C. C. R. 107.
2 *Alsop*, (1869) 11 Cox 264. See *Charles Naylor*, (1868) 11 Cox 13.
3 *Mullany*, (1865) 34 L. J. (M.C.) 111.
4 *Lavey*, (1850) 3 C. & K. 26.
5 *Fateh*, (1882) 5 All. 217.
6 *Keilasum Putter*, (1870) 5 M. H. C. 373.
7 *Thewa Ram*, (1882) 10 C. L. R. 187.
8 *Ram Chand*, (1890) P. R. No. 26 of 1890.
9 *Jowahir Singh*, (1892) P. R. No. 16 of 1894.
10 *Badri Prasad*, (1917) 40 All. 35.

being asked whether such a sum of money between the parties answered that it was ... of them by agreement it was held that he could not be punished for perjury[1] Where a witness being asked by a Judge

... all or not and that the manner of bringing them was only a circumstance Where a witness swore that a person drew his dagger and wounded J whereas in truth he

prosecutor denying this the accused called M as his witness who swore that he did meet the prosecutor along with the accused the night before the burglary and that the prosecutor did propose to them to commit a burglary On the trial of M for perjury it was held that the evidence was not material[4]

Non-liability of the accused for fabricating false evidence —The authors of the Code say We do not propose to punish him for fabricating evidence

as likely to lead a jury to think the death accidental we do not propose to punish A as the fabricator of false evidence [5]

Statu ... *oceedings*—Proceedings held under certain Acts ... to be judicial proceedings within the meaning ... persons making false statements in the course of enquiries conducted under certain Acts of Legislature are treated as having given false evidence within the meaning of this section[7]

193 Whoever intentionally[1] gives false evidence in any stage of a judicial proceeding[2] or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding[3] shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine,

Punishment for false evidence

[1] 1 Hawk. P C (Perjury) c 27 s. 8 p 433 2 Roll 42 *Lawton's* case
[2] 2 Roll 41 1 Hawk P C (Perjury) c 27 s. 8 p 433
[3] 1 Hawk. P C (Perjury) c 27 s 8 pp 433 434.
[4] *Murray* (1858) 1 F & F 80
[5] Note G p 131 See *Ram Kh lawan* (1906) 28 All 705
[6] The Coroners Act (IV of 1871) s 8 the Broach and Kaira Encumbered Estates Act (XXI of 1881) s 34 the Sindh Encumbered Estates Act (XX of 1896) s 36 the Bombay Land Revenue Code (Bom Act V of 18 0) s 196 the Bombay Salt Act (Bom Act II of 1890) s 53 the Oudh Talukdars Relief Act (XXIV of 1870) s 16 the Bundelkhand Encumbered Estates Act (U P Act I of 1903) s 33 the Punjab Minor Canals Act (Punj Act III of 1905) s ... the Indian Income tax Act (XI of 1922) s ... the Indian ...

Broach and Kaira Encumbered Estates (XXI of 1881) s ... the Indian ... Marriage Amendment Act ... the Sindh Encumbered Estates ... 1896), s ... Estates Act ...

and whoever intentionally gives or fabricates false evidence in any other case[4], shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

COMMENT.

This section specifies the punishment which should be inflicted for offences described in ss. 191 and 192. If the offences are committed in any stage of a judicial proceeding they are more severely punishable than when they are committed in a non-judicial proceeding.

1. **'Intentionally'.**—Intention is the essential ingredient in the constitution of this offence[1]. Proof of corrupt intention is not necessary. It is enough to prove intention, and if the statement was false, and known or believed by the accused to be false, it may be presumed that in making that statement he intentionally gave false evidence[2]. False evidence is intentionally given if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true[3]. It is not sufficient to show that the witness probably knew the real facts. It must be shown that he had personal knowledge[4]. The Court may infer the corrupt intention from surrounding circumstances[5]. If, having regard to all the circumstances of the case, it appears that the falsehood was not wilful, but rather proceeded from inadvertence or a mistake as to the true nature of the

1 *Munni Buksh,* (1898) 3 C. W. N. 81; *Azibulla Sarkar* v. *Udoy Sonthal,* (1908) 13 C. W. N. 422; *Rattan Singh,* (1911) P. L. R. No. 72 of 1911, P. W. R. (Cr.) No. 14 of 1911.

2 *Amere Ali Khan,* (1871) 3 N. W. P. 133; *Nga Yon,* (1918) 3 U. B. R. 84; *Mian Taj Mahmud,* (1927) 29 P. L. R. 14.

3 *Babu Ram,* (1904) 26 All. 509; *Jankilal,* (1929) 30 Cr. L. J. 655.

4 *Natha Singh,* (1927) 9 L. L. J. 414.

5 *Rhutten Ram,* (1865) 2 W. R. (Cr.) 63.

question the evidence could not be considered to be false evidence intentionally given An inconsistent statement made during cross examination is not perjury if it is the result of confusion or mistake If a man reverts to the truth in the course of the trial he cannot be prosecuted for perjury[1]

A man cannot be convicted of perjury for having acted rashly or for having failed to make reasonable enquiry with regard to the facts alleged by him to be true[2]

2 **Gives false evidence in any stage of a judicial proceeding** —A [illegible] rjury in respect of a [illegible] a person answers [illegible] tell the truth and the answers are not true he commits perjury whether the questions which he has answered are such as should have been or could have been properly asked[4] An [illegible] affidavit of service of process for the purpose [illegible] commits an offence under this section By [illegible] any step taken by the Court in the course [illegible] with a case pending[5]

An inquiry under s 11 of the Frontier Crimes Regulation is not a judicial [illegible] but a proceeding before an addition [illegible] account books pursuant to a notice [illegible] inquiry or investigation by a Court or Board under s 9 of the Trade Disputes Act (VII of 1929) is [illegible]

This section does not apply to a false deposition given before a Court of a Native State[9]

3 **Fabricates false evidence for the purpose of being used in any stage of a judicial proceeding** —The word fabrication refers to the fabrication of false evidence and if the evidence fabricated is intended to be used in a judicial proceeding the offence is committed as soon as the fabrication is complete it is immaterial that the judicial proceeding has not yet been commenced[10]

It is not essential to show that any actual use has been made of the evidence fabricated The mere fabrication is punishable under this section the use of the [illegible] of the Magistrate by a [illegible]

4 **Intentionally gives or fabricates false evidence in any other case** —A conviction may be had under this section even if the evidence be given in matters not judicial but it must be proved that the false statement was made under the sanction of law[12]

Explanation 2 —A preliminary inquiry held by a Court under s 476 of the Criminal Procedure Code is a stage of a judicial proceeding under this explanation and a person giving false evidence in the course of it commits an offence under this section[13]

The Bombay High Court has in a Full Bench case laid down that a statement recorded by a Magistrate in the course of a police investigation under s 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of this explanation[14]

1 [illegible]
2 [illegible]
3 [illegible]
4 [illegible]
5 [illegible]) 6 Pat 60
6 *Munni Buksh* (1898) 3 C W N 81
7 *Jahangir* (19?4) 6 L L J 375
8 *Lal Mohan Poddar* (19?7) 55 Cal 423
9 *Rambharthi Hirabharth* (19?3) 47 Bom 907 2? Bom L R 77? Bom Cr C ?8
10 *Mula* (1879) 2 All 10?
11 [illegible]

Amendment.—The words "or before a Military Court of Request" after "Court-Martial" were repealed by Act XIII of 1889.

PRACTICE.

Evidence.—Prove the following points for giving 'false evidence':—

(1) That the accused was legally bound to state the truth, either by an oath or by an express provision of law[1], or

That the accused made the declaration in question.

Due administration of the oath to the accused person should be proved like any other fact[2].

(2) That he made such statement or declaration whilst so bound[3].

(3) That such statement, or declaration, was made in a stage of a judicial proceeding[4].

(4) That the statement or declaration is false.

(5) That the accused when making such statement or declaration, (*a*) knew it to be false, or (*b*) believed it to be false, or (*c*) did not believe it to be true[5].

(6) That he made such false statement intentionally.

If the case falls under the second part of the section it is not necessary to prove (3).

Prove the following points for 'fabricating false evidence':—

(1) That the accused (*a*) caused a certain circumstance to exist, or (*b*) made the false entry, or (*c*) made the document to contain a false statement.

(2) That he did as in (1) intending that such circumstances, entry, or statement should appear in evidence (*a*) in a judicial proceeding, or (*b*) in a proceeding taken by law, before a public servant, or (*c*) in a proceeding before an arbitrator.

There must be a distinct finding to this effect. Where the accused by falsely representing to the Marriage Registrar that a certain marriage had been solemnized, induced the Registrar to make a false entry of the registration of the marriage, it was held that he could not be convicted of the offence of fabricating false evidence under this section in the absence of a finding that the intention of the accused was that the false entry in the marriage register might appear in evidence in a judicial proceeding or some other proceeding of a like nature as contemplated by s. 192[6].

(3) That the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence appeared[7].

(4) That the accused intended that person to entertain an erroneous opinion upon the evidence.

(5) That such erroneous opinion touched a point material to the result of such proceeding[8]. It should be distinctly shown whether the evidence on which perjury is assigned is material in respect of matters in issue in the cause[9].

If the case fall under the second part of the section it is not necessary to prove (*a*) in (2).

Nature of proof.—"The true rule (in a case of giving false evidence) is that no man can be convicted of giving false evidence *except on proof of facts which, if accepted as true,* shew not merely that it is incredible, but *that it is impossible that the statements of the party accused made on oath can be true.* If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a

1 *Munwar Khan,* (1865) 4 W. R. (Cr.) 24.
2 *Alay Ahmad,* (1919) 20 Cr. L. J. 370.
3 *Siddhoo,* (1870) 13 W. R. (Cr.) 56.
4 *Fatik Biswas,* (1868) 1 Beng. L. R. (A. Cr. J.) 13, 10 W. R. (Cr.) 37.
5 *Maharaj Misser,* (1871) 7 Beng. L. R. App. 66, 16 W. R. (Cr.) 47; *Amere Ali Khan,* (1871) 3 N. W. P. 133; *Bankatram Lachiram,* (1904) 6 Bom. L. R. 379; *Prakash Chandra Sarkar,* (1905) 2 C. L. J. 101.
6 *Mohamed Siddiq,* (1907) 11 C. W. N. 911.
7 *Ganga Sahai,* (1902) 23 A. W. N. 68.
8 *Ball,* (1854) 6 Cox 360.
9 *Mohamed Siddiq,* sup.

conviction can stand, because, assuming all that is proved to be true, it is still *possible* that no crime was committed"[1]

According to the Indian Evidence Act no particular number of witnesses is required to prove any fact, though perjury according to English law must be proved by two witnesses, or by one witness, *confirmed* either by a *written document*, or by some material and relevant facts which contradict the statement upon which the perjury is assigned It has been laid down that in ordinary cases and where the provisions peculiar to the Indian law do not apply, the rule of English law which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India[2]

The statement which the accused is charged with having made before a [illegible] to have been made by him[3] No evidence which [illegible] words used by the accused can alone be a safe [illegible] it is sufficient if a witness states from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it[5].

The prosecution should make out that there was on the day stated in the charge a judicial proceeding pending, and that the accused in the course of that proceeding made the statement alleged to be false[6]

Proceedings in a trial.—The proceedings in a criminal trial, when necessary to be proved, should be proved by their production[7]

The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge[8]

Deposition.—When a person is charged with giving false evidence upon a [illegible] is the person [illegible] (e g on the [illegible] he gave it on oath [illegible] is accompanied by a memorandum signed [illegible] signature thereto is proved, then the deposition is proof of what the person charged with perjury stated, and he is concluded by it[9] It is always necessary to prove the deposition alleged to contain the false statement[10] If the deposition on which the prosecution is based is not properly taken the [illegible] interpreted to the [illegible] the Civil Procedure [illegible] laid down that non compliance with the provisions of s 360, Criminal Procedure Code, would not by itself be a ground sufficient for quashing a conviction,

[1] Per Norman J, in *Ahmed Ally* (1869) 11 W R (Cr) 25, 27, *Padarath Singh* v *Palan Singh*, (1919) 5 P L J 23, *Gupta*, (1923) 1 Ran 290 The Judicial Commissioner of Oudh has held that to justify a conviction for perjury it is not necessary to prove that the statement is impossible it is sufficient to prove it is incredible *Mohamad Ismail Khan* (1919) 22 O C 236

[2] *Bal Gangadhar Tilak*, (1904) 6 Bom L R 324, 339

[3] [illegible]

[illegible] *[illegible]*, (1871) 8 B H. C (Cr C.) [illegible]

37

[8] *Shib Chandra Das*, (1870) 6 Beng L R 730n

[9] [illegible]

Kamatchinathan Chetty (1904) 28 Mad 308, [illegible]

though it might be taken into account with other elements of objection to the satisfactory character of a trial[1]. Under the Privy Council ruling s. 537, Criminal Procedure Code, cures the defect of non-compliance with the provisions of s. 360, but it is submitted the Privy Council ruling will not apply where the provisions of O. XVIII, r. 5, of the Civil Procedure Code, are not complied with because there is no provision similar to s. 537 in the Civil Procedure Code. There can be no conviction under this section based on a false statement which is not made and recorded with all due formalities in the manner required by law[2]. The deposition itself ought to be put in, and proceedings in the case ought also to be put in to show the nature of the procedings in which the evidence is given. Oral evidence of the contents of the deposition is inadmissible under s. 91 of the Evidence Act[3].

Where the false evidence is alleged to have been given in a deposition in a case in which the law requires the evidence to be taken down in writing, a certified copy of the deposition must be placed on the record. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeuing. The mere production of a certified copy is not sufficient to show that the accused is the person who made the statement. There must be oral evidence of some one, who heard the deposition given, that the accused is the person whose evidence is therein recorded[4].

The record of a previous deposition given by the accused is relevant and necessary evidence. Such record is not inadmissible under s. 145 of the Evidence Act[5].

The failure of a civil Court to make a memorandum of the evidence of the accused when examined before it does not vitiate the deposition, if the evidence itself was duly recorded in the language in which it was delivered in such Court[6].

Powers of Appellate Court.—"It is an unusual and not...a proper procedure for an Appellate Court which did not hear the evidence to order a prosecution for perjury in the lower Court on materials which were not before that Court and which the witness had no opportunity of explaining while in the box"[7].

Contradictory statements.—Where a person makes two contradictory statements, he may now be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false[8]. Thus the confusion created by the vast array of conflicting rulings of the different High Courts is done away with.

A statement made by an approver, to whom a pardon has been tendered not in the course of any "inquiry" under the Criminal Procedure Code, cannot form the basis of an alternative charge of an offence punishable under this section[9].

If one of the statements is made before a Magistrate not having authority to carry on preliminary inquiry in the case and the other before a Magistrate having jurisdiction, there will not be a sufficient basis for an alternative charge of giving false evidence[10]. But where a witness had made one statement on oath before a Third Class Magistrate under s. 164 of the Criminal Procedure Code, and again

1 *Abdul Rahman*, (1926) 29 Bom. L. R. 813, 54 I. A. 96, overruling *Hira Lal Ghosh*, (1924) 52 Cal. 159 and *Dargahi*, (1924) 52 Cal. 499. The cases of *Mohendra Nath Misser*, (1908) 12 C. W. N. 845; *Jogendra Nath Ghose*, (1914) 42 Cal. 240; *Haro Nath Malo*, (1922) 28 C. W. N. 119; *Bansi Pandey*, (1917) 2 P. L. W. 176 and the recent cases of *Samserali Hazi*, (1925) 53 Cal. 129 and *Abdul Mallick*, (1925) 42 C. L. J. 585, are no longer of any authority.

2 *Kartar Singh*, (1916) P. R. No. 15 of 1917.

3 *Bapu Naran*, (1888) Unrep. Cr. C. 401, Cr. R. No. 62 of 1888; *Imam Din v. Niamat Ullah*, (1920) 1 Lah. 361.

4 *Mi Shwe Ke*, (1902) 1 L. B. R. 268.

5 *Gannoo Mahto*, (1908) 9 C. L. J. 378.

6 *Beharee Lall Bose*, (1868) 9 W. R. (Cr.) 69.

7 Per Holmwood, J., in *Loke Nath Sahi*, (1906) 10 C. W. N. 1091, 1093.

8 *Vide* ill. (*b*) to s. 236, Criminal Procedure Code.

9 *Motilal Hiralal*, (1921) 23 Bom. L. R. 884, 6 Bom. Cr. C. 96, 46 Bom. 61.

10 *Bharma Ningappa*, (1886) 11 Bom. 702, F. B.; *Shettepa Satapa Mudenavar*, (1912) 14 Bom. L. R. 753, 1 Bom. Cr. C. 167.

another and totally inconsistent statement at the trial of the case before a First Class Magistrate, it was held that he could be convicted under the second—if not under the first—paragraph of this section[1] A Full Bench of the Bombay High Court has held that although a statement which is made in the course of a police [illegible]

[illegible] false evidence founded on such statement was bad and that a conviction and sentence founded on such statement as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof or finding that the second statement was false, could not be maintained[3] It is not necessary that the contradictory statements must have been made at different inquiries or trials to render a person liable to conviction[4] The accused deposed before a Magistrate that he had seen P and others gambling in a certain place The deposition was read over to the accused and acknowledged by him to be correct In his cross examination some days after he deposed that he did not know P and [illegible] under this section [illegible] two contradictory [illegible] or did not believe to be true On the question being raised, on revision, whether the conviction was legal or illegal, by reason of the fact that the contradictory statements were made [illegible] ne and the same trial, it was held [illegible] he fact of a witness having made [illegible] Magistrate and in Court would [illegible] perjury Under exceptional circumstances such step may be taken[6]

With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony[7] Every possible presumption in favour of reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false[8] An opportunity should always be given to the accused to explain what he meant by two apparently contradictory statements[9].

[illegible] Procedure Code, contradicted that made before the Magistrate and it was held that a sanction to prosecute in respect of the statement made before the Magistrate was not invalid.

[3] *Purshottam Ishwar Amin* (1920) 45 Bom 834, 23 Bom. L R 1, 6 Bom Cr C., 1, 45 Bom 834, F B., overruling *Muggapa*, (1893) 18 Bom 377, F B *Patraju*, (1925) 2 O W N 637

[4] *Hari Charan Singh*, (1900) 27 Cal 455

[4] *Palani Palagan*, (1902) 26 Mad 53, Bhashyam Ayyangar, J, *dissentiente* The opinion of Bhashyam Ayyangar, J, is followed in *Lachhmi Narain*, (1913) 16 O C 81 See *Habibullah*, (1884) 10 Cal 937

[5] *Palani Palagan*, sup

[6] *See Tripura Sankar Sarkar*, (1910) 14 C W. N 767

[7] *Ross*, (1871) 6 M. H C 342

[8] Per Duthoit, J, in *Ghulet*, (1884) 7 All 44, *K Narayanan Nair*, (1910) 8 M. L T 80, [1910] M W N 397, *Bansi Pandey* (1917) 2 P L. W 176, *Barkat Ram*, (1911) P L R No 158 of 1911, P W R (Cr) No 38 of 1911, *Taj Mahmud*, (1927) 29 P L R 14

[9] *Fazal Din*, (1921) 3 L. L. J 442.

It is necessary to prove that both the contradictory statements were s[…] that a charge of giving intentionally false evidence might have been made in rega[…] to either of them or in regard to both of them in the alternative[1]. A witne[…] making two contradictory statements in the course of the same deposition cann[…] ordinarily be held to have committed perjury in one or the other of them alter-natively. If the first can be proved untrue he can be found guilty, technically of an attempt to commit perjury at the most, and if the second can be proved untrue he can be convicted of perjury, but if neither is affirmatively proved untrue he cannot be convicted in the alternative of anything more than the attempt[2].

In the case of contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time"[3]. "The Court dealing with them (contra-dictory statements) should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated *facts* on which his first statement was based and then denied these *facts* on oath on a subsequent occasion"[4]. Ordinarily it would be inadvisable to launch a prosecution for perjury under such circum-stances as it compels a witness to adhere to his original lie under penalty of a pro-secution if he tells the truth[5]. Where the witness has corrected his previous state-ment in the same deposition every presumption in favour of his having made the incorrect statement in good faith should be raised in his favour, as it is undesirable that witnesses should be afraid to correct mistakes for fear of rendering themselves liable to prosecution[6].

Where the evidence on which the prosecution relied to prove a statement made by the accused to be false, consisted solely of his own previous contradictory statements, it was held that such evidence was not sufficient to justify a conviction[7].

Witnesses should not be prosecuted because they give evidence which is con-tradictory. It is only where a Court is expressly of opinion that it is expedient in the interest of justice that an enquiry should be made into the offence of giving false evidence that an order under s. 476 of the Code of Criminal Procedure can be made[8].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—riable by Court of Session, or Presidency Magistrate, or first class Magistrate.

The making of any number of false statements in the same deposition is one gregate case of giving false evidence. Charges of false evidence cannot be ultiplied according to the number of false statements[9]. But the Bombay High urt has ruled that where a person makes several false statements in the course single deposition, he commits as many offences as there are false statements[10].

Before criminating a man upon his own statement under examination, it is ssary to see that such statement has been deliberately made and recorded; after being recorded it has been shown or read to the accused; and that the

ari *Charan Singh*, (1900) 27 Cal. 455; *and*, (1904) 5 P. L. R. 261.
mbhir Bhujua, (1926) 23 N. L. R. 35.
Jenkins, C. J., in *Bankatram Lachi*-04) 6 Bom. L. R. 379, 397, 28 Bom. 533.
Chandavarkar, J., in *Bankatram*, (1904) 6 Bom. L. R. 379, p. 382.
(1901) P. R. No. 21 of 1901.

6 *Girdharimal*, (1915) 9 S. L. R. 202.
7 *Bukshali*, (1911) 5 S. L. R. 136.
8 *Keramat Ali*, (1928) 55 Cal. 1312.
9 (1871) 6 M. H. C. App. 27; *Rakhal Chandra Laha*, (1909) 36 Cal. 808, 9 C. L. J. 690.
10 *Sejmal Punamchand*, (1926) 29 Bom. L. R. 170, 9 Bom. Cr. C. 18, 51 Bom. 310.

examination has been attested by the signature of the Magistrate following a certificate to be given under his own hand[1]

Deposition to be read as a whole —A deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him[2]

Reading extracts from the alleged conflicting statements of the accused is not sufficient to enable the jury to form a fair opinion on the question The whole of the deposition given on each occasion ought to be laid before the jury[3] There ought to be a *locus penitentiæ* for witnesses who have deposed falsely retracting their false statements[4]

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earlier statement was false and corrects it it is not desirable to subject such a witness to a prosecution for perjury[5]

Witness criminating himself —Although a person under examination as a witness is bound by his affirmation to tell the truth if he is examined on a point on which he is likely to criminate himself his position should be explained to him by the Magistrate as otherwise he may be induced through ignorance of the state of the law to deny the existenc
without such a warning he n
of the offence of intentionally g
of severe punishment[6]

Deposition of a witness upon which assignment of perjury is based when [illegible] —A was convicted of giving false evidence in a
after his evidence had been recorded his
perjury were based was read over to him

by the Court clerk in a place where neither the Judge nor Vakils were present The Madras High Court held that the conviction could not be sustained The deposition upon which the prosecution was based not being properly taken in accordance with law it could not be admitted in evidence[7] This decision is doubted in a subsequent case in which it is held that a conviction for perjury may be upheld if the deposition had been read over to the witness and acknowledged by him to be correct even though the reading over was not in the presence of the Judge and of the accused and of the pleaders for prosecution and defence as required by law[8]

t is held that
in evidence[9]
that where a

deposition of a witness is not read over and interpreted to him before it is signed by him he cannot be prosecuted for perjury on such deposition under this section Omission to interpret and read over the deposition to the witness is not a mere irregularity but renders the record inadmissible in proof of the deposition under

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1 *Mussam t Atrunı* (1867) 7 W R (Cr) 49
2 *Gopal* (1890) Unrep Cr C 502 Cr R No 16 of 1880 *Pand Aanaj* (1916) 19 Bom L R 61 4 Bom Cr C 8 *Abdul Rahman* (1906) 29 Bom L R 813 54 I A 96
3 *Kally Churn Gangooly* (1866) 6 W R (Cr) 92
4 *Cul e Mullck* (1864) W R (Gap No) (Cr) 10
5 [illegible]
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7
308
8 *Bogra* (1910) 34 Mad 141
9 *Meango v Barsah* [1918] M W N 239
10 *Vall Chench ah* (1919) 42 Mad 561

s. 80 of the Evidence Act it is altogether inadmissible in evidence. But the perusal of his deposition by a witness is a substantial compliance with r. 5, O. XVIII, of the Civil Procedure Code, and such deposition, when duly signed by the Judge, is admissible under s. 80 of the Evidence Act, without proof, on a subsequent trial of the deponent for giving false evidence[1]. The provisions of O. XVIII, rr. 5 and 6, of the Civil Procedure Code, are directory, and non-compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him in the course of a civil suit[2]. The former Chief Court of the Punjab laid down that where there was no evidence to show that the deposition of a witness in a civil suit was not read over to him by the Judge, it must be presumed under s. 80 of the Evidence Act that the Judge complied with the provisions of O. XVIII, r. 5, of the Civil Procedure Code; and that an accused person might be convicted of the offence of having given false evidence before a civil Court notwithstanding that the Court had made no note in writing to the effect that the evidence had been read out to the deponent[3].

It has been held that a conviction for perjury may be upheld where the deposition of a witness was not read over to him in the presence of the accused or his pleader in accordance with s. 360 of the Code of Criminal Procedure[4].

A hearsay statement recorded by a Magistrate cannot be made the subject of prosecution under this section[5].

Separate trial.—In prosecutions for giving false evidence the case of each accused person should be separately inquired into, and, if committed for trial, separately tried. It is wholly erroneous to include them in one joint charge[6]. The joint trial of several persons for perjury is illegal[7]. A person accused of perjury is entitled to have the specific charge made against him tried quite independently of a like charge against another person[8]. The Bombay High Court has laid down that joint trial of two accused is permissible under s. 239 of the Criminal Procedure Code if there was a common purpose to make false statements. In such a case there is one transactions from the point of view of both the accused and their joint trial for making false statements to achieve that object is legal[9]. Crump, J, said: "The test is...whether the two persons concerned are engaged in one transaction, and to determine that it is necessary to regard the acts from the point of view of those two persons. If they are animated by ommon purpose, and there is continuity in their action then surely there is on ransaction so far as they are concerned. It may even be that community o urpose is not necessary".

Complaint.—Complaint in writing of the Court before which the offence is mmitted or of some other Court to which such Court is subordinate is required[10]. osecution should be instituted after due consideration on the part of the Court ore whom the false evidence was given, or on the part of a Court to which such rt is subordinate[11]. The Court is bound to satisfy itself that there is at least rima facie case, and that there is a reasonable prospect of a successful termin-

Ramesh Chandra Das, (1919) 46 Cal. 895.
Elahi Baksh Kazi, (1918) 45 Cal. 825.
agat Ram, (1918) P. R. No. 28 of 1918.
Mohendra Nath Misser, (1908) 12 C. W. N.
edi, (1910) 7 A. L. J. 618.
az Ali, (1882) 5 All. 17; *Anant Ram,* 4 All. 293; *Changu,* (1882) 2 A. W. N. *Ruttee Ram,* (1870) 2 N. W. P. 21; (1869) 11 W. R. (Cr.) 16; *Moharaj* (1871) 7 Beng. L. R. App. 66, 16 W.R. ; *Kotha Subba Chetti,* (1883) 6 Mad. 252; *Nathu Sheikh,* (1884) 10 Cal. 405.

7 *Lachhman Singh,* (1922) P. W. R. No. 15 of 1922.

8 *Khoab Lall,* (1868) 9 W. R. (Cr.) 66; *Bhairo Misser,* (1867) 7 W. R. (Cr.) 51; *Bhavanishankar Haribhai,* (1868) 5 B. H. C. (Cr. C.) 55.

9 *Sejmal Punamchand,* (1926) 29 Bom. L. R. 170, 9 Bom. Cr. C. 18, 51 Bom. 310.

10 Criminal Procedure Code, s. 195. See also ss. 476-478-487.

11 *Mahomed Hossain,* (1871) 16 W.R. (Cr.) 37.

ation of the prosecution[1] and that a prosecution is necessary in the interests of justice[2] The statement must be intentionally false in order to justify a prosecution[3] The offence of perjury is an offence against public justice The person best qualified to say whether a prosecution should or should not be instituted is the judge before whom the evidence was given and who had considered all the facts of the case[4] Ordinarily it is inadvisable to launch a prosecution for perjury under such circumstances as will compel a witness to adhere to his original lie under penalty of a prosecution if he tells the truth[5] Where a witness makes a statement which is false and at once admits this and states what is the real truth he should not be prosecuted for giving false evidence[6]

No Court should entertain an application to prosecute made by persons who are not parties to the suit out of which the proceedings for giving false evidence arise[7] A complaint should only be made after careful consideration and having in view the ends of justice and not in order to assist the private ends of individuals It is desirable in most cases that the Court should have all the facts before it[8]

A prosecution for perjury should be instituted as soon as possible An officer other than he who tried the case in which perjury was committed does not act without jurisdiction if he files a complaint to prosecute but it is very much more satisfactory that the complaint should be made by the very judge in whose Court an offence has actually taken place[9]

A complaint for an offence under this section must specify the false evidence the accused is charged with The exact [illegible]
based and the exact offences which the M[illegible]
pointed out[10] The particular words which [illegible]
so that the accused person should not be taken by surprise[12] The accused should be in a position to know what statements are alleged to be false[13]

Although notice is not invariably necessary the person sought to be prosecuted must be heard[14] It is necessary that he should be given an opportunity to substantiate his allegations[15] The Court must form judgment upon legal evidence In cases in which the Magistrate dismisses the original complaint upon a report from the police there is no legal evidence before him on which to form his judgment In cases however in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused no notice to the complainant is necessary[16] When a civil Court takes action under s 476 to prosecute a person for perjury such Court is bound to set forth in its order the specific assignments of perjury alleged against the accused Failure to do so is a material irregularity within the meaning of s 115 of the Code of Civil Procedure[17]

1 See *Mathura Sahu* v *Damri Ram* (1911) 15 C L J 337 *Danappa Narsappa* (19?1) ?4 Bom L R 45 6 Bom Cr C 159

2 *S Veeraraghava Swami Naidu* v *Bhagavat la Visvanadhan* [1911] 2 M W N 172

3 *Sheodahin Singh* v *Bandhan Singh* (1905) 2 A L J 836

4 *Cheranji Lal* v *Ram Lal* (191?) 9 A L J 339

5 See *Dad* (1901) P R No 21 of 1901 [illegible]

[illegible] W N 3

8 See *Lad Ram* v *Rasal* (1909) [illegible] A L T 50 *Deroo Jethram* Cr Appeal No 350 of 1910 3rd Nov 1910 Cor Batchelor and [illegible] JJ (Unrep Bom) *Daroga Jha* (1900) [illegible] P L T 311 *Trailokya Nath Banerji* v *Radharanjan* (1921) 25 C W N 586

10 *Kartick Chunder Holdar* (1868) 9 W R [illegible]

[illegible] 1? Cal 58 F B *Mangar Ram* v *Behari* (1896) 18 All 358

15 *Seshayya* v *Subbarayudu* sup[illegible]

16 See *Sheik Beari* (188[illegible]) 10 [illegible]

17 See *Kash Shukul* (1916) [illegible]

Accused must have full notice of the case against him[1]. Complaint to prosecute should not be lightly launched in cases where the Courts would have to determine the question by merely weighing the evidence on both sides[2]. The prosecution for perjury is an exceptional measure and complaint ought not to be made when material has only been provided by an unnecessary examination on oath. Magistrates should not be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement[3].

A Court filing a complaint in respect of contradictory statements must be competent to file a complaint in respect of each of the statements[4]. When contradictory statements, forming the basis of an alternative charge of giving false evidence, are made before different Courts, the complaint of each of those Court is necessary before the Court can take cognizance of the charge of giving false evidence[5].

A Court should not file a complaint when the case in which perjury is committed has gone to a higher tribunal[6].

Notice.—Where a Judge issues notice to the accused to show cause why his prosecution under this section should not be launched, he must allow sufficient time for the notice to be served upon the accused and should not file a complaint before the notice has been served[7].

Calcutta Rule.—When, during the investigation of a complaint under Chapter XX of the Criminal Procedure Code, it may appear to the Magistrate that a witness is giving false evidence, so that criminal proceedings against such witness are likely to be necessary, the Magistrate will exercise a sound discretion in taking down, under, 359, at least the evidençe of this particular witness at length in the manner prescribed in ss. 356, 357 and 360[8].

The Lahore Rules.—The attention of all Magistrates is called to the law regarding 'giving or fabricating false evidence' contained in ss. 191 to 196 of the Indian Penal Code.

2. It may add too much to the already heavy work of Magistrates to prosecute every person who is guilty of these offences, but it is prejudicial to the interests of justice to allow any gross case to pass unnoticed. It is the duty, therefore, of every judicial officer to bring every case which happens in his Court to the notice of the District Magistrate. The District Magistrate will decide whether a prosecution should be instituted.

3. It should be remembered that the provisions of s. 487 of the Code of Criminal Procedure, make it clear that a Court before which the offence of giving false evidence has been committed is precluded from trying the offence itself.

4. Attention is also called to ss. 195 and 476 of the Code of Criminal Procedure, which so far protects witnesses that no prosecutions are to be instituted in the Criminal Courts except on the complaint in writing of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate. The offence is one against public justice, and the prosecution is not left to the discretion of individuals. Section 476 (B) enables a superior Court on application, to order the withdrawal of complaint made by subordinate Court, or to make a complaint which a subordinate Court has refused to make.

1 See *Rakhal Chandra Laha*, (1909) 36 Cal. 808, 9 C. L. J. 690.

2 See *Padarath Singh* v. *Ratan Singh*, (1919) 5 P. L. J. 23.

3 *Nga Bo Gyi*, (1925) 3 Ran. 224.

4 See *Reddi Rami Reddi*, (1914) 27 M. L. J. 586.

5 See *Purshottam Ishvar Amin*, (1920) 45 Bom. 834, 23 Bom. L. R. 1, 6 Bom. Cr. C. 1, F. B.

6 *Birendra Nath Das Gupta*, (1914) 18 C. W. N. 1342.

7 See *Umarbhai*, (1888) Unrep. Cr. C. 404, Cr. R. No. 65 of 1888.

8 C. H. C. R. & O., Ch. I, Rule 43, p. 16.

5 Sub section (3) of s 195 defines for purposes of these sections to what Court any Court is subordinate Thus a District Magistrate (or any other Magis trate) with powers under s 30 of the Code is subordinate to the Court of Session In Districts in which by Notification under s 39 of the Punjab Courts Act the

subordinate to the Col ector

decided by the Court of Session

7 The Judges consider that the law against perjury should be fully vindicated against all persons who are convicted of perjury and Magistrates should impose de terrent sentences when convictions are obtained in prosecutions for perjury in the Courts[2]

When proceedings to be instituted —Proceedings under s 476 Criminal Procedure Code should not be taken against a person for giving false evidence or fabricating a false document under this section until the case in which the said evidence was given or such document was used has been finally decided[3]

Charge —In framing a charge for giving false evidence the charge should be precise The charge should show the particular matter in respect of which the accused is put upon his trial and only so much of the accused s statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution[4] It should contain a distinct assertion with regard to each statement intended to be characterised as perjury[5] It should specifically state what words or expressions the accused is charged with having uttered and in what respect they are supposed to be false[6] The precise words used by the accused should be recorded not merely the effect or a paraphrase of those words[7]

It is very irregular in a charge of intentionally giving false evidence to put the whole of a long statement bodily to a witness at once A conviction on such a charge could be properly had only on proof that the accused person had made each and every statement contained in the document[8]

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ing the offence
not only to the
accused but also to the trying Court of specific offences against the accused[11]

Different occasions —Where the accused is charged with giving false evidence on different occasions each occasion should form the subject of a distinct head in the charge[12]

[1] *Dina Nath Gautam* v *Muhammad Abdulla* (1920) 2 Lah 57

[2] L. H C R & O Vol II Chap XXII p 114

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[7] *Boodhun Ahir* (1872) 17 W R (Cr) 32 *Mungul Dass* (1875) 23 W R (Cr) 28, *Mi Shwe Ke* (1902) 1 L. B R 268

[8] *Isab Mandal* (1900) 28 Cal 348

[9] *Fati Biswas* (1868) 1 Beng L. R (A Cr J) 13

[10] *Moharaj Misser* sup

[11] *Pam Dhari Singh* (1917) 4 I L. W 44

[12] *Fe jdar Ro j* (1868) 9 W r) 14

Central Provinces Circular.—In prosecutions for giving false evidence, under ss. 193, 194 and 195 of the Indian Penal Code, the particular statements alleged to be false must invariably be set out in the charge, to enable the accused to understand fully the offence with which he stands charged[1].

Form.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at—, in the course of the trial of——, before——, stated in evidence that (*mention here the false statement*) which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[2].

Punishment.—A false statement by a witness, as to his position or character ought not to be punished so severely as a false charge on a false claim[3].

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over. But for a simple mis-statement from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty and throws himself at the mercy of the Court[4].

By the Frontier Crimes Regulation[5] an offender convicted under s. 193, 194, 195, 196, 201, 211, and 212 may be sentenced in lieu of or in addition to fine to be whipped, or to imprisonment not exceeding seven years, or to whipping and imprisonment not exceeding five years, or to transportation for not more than seven years.

Attempt.—The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of judicial proceeding cannot extend beyond one-half of seven years[6].

Giving or fabricating false evidence with intent to procure conviction of capital offence.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely[1] that he will thereby cause, any person to be convicted of an offence[2] which is capital by the law of British India or England[3], shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If innocent person be thereby convicted and executed.

and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

COMMENT.

The offence under this section is an aggravated form of the offence of giving or fabricating false evidence made punishable by s. 193.

1 C. P. Cr. C. (1929) No. 16 (4), p. 47.
2 Criminal Procedure Code, Sch. V, xxviii (5).
3 *Rewah Goallah,* (1866) 5 W. R. (Cr.) 95; *Govind Sahoo,* (1864) W. R. (Gap No.) (Cr.) 14.
4 *Gunjoon Aheer,* (1867) 7 W. R. (Cr.) 37 [55].
5 III of 1901, ss. 11 (3) (*d*) and 12 (2).
6 *Soondur Putnaick,* (1865) 3 W. R. (Cr.) 59.

To constitute an offence under this section the accused must give false evidence intending thereby, that is, by giving such false evidence, to cause or knowing it to be likely that he will thereby, that is, by giving such false evidence cause some person to be convicted of a capital offence. It is not necessary under this section that the false evidence which is given should be evidence given in a Court of Justice. Such statement in the opinion of the Calcutta High Court, even if made to a police officer, will amount to the offence of giving false evidence, provided that the Court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case[1]. But the Bombay High Court has held that as the words 'in any stage of judicial proceeding' occurring in s. 193 are not repeated in this section the latter, therefore refers only to the final stage, that is, the trial of the case[2]. Where an accused had in a preliminary inquiry before a Magistrate made a deposition in which he falsely stated that he had seen ... g a murder, it ... of such false ... charged to the Court of Session, and not necessarily a conviction, and it must be presumed that the accused intended the natural, that is, the ordinary consequences[3].

1. 'Intending thereby to cause or knowing it to be likely'.—When the proceeding in which evidence is given is one in which a conviction is not possible, it is difficult to affirm that the accused had such intention or knowledge as is necessary under this section. A person giving false evidence before a Magistrate holding a preliminary inquiry into a charge of murder does not commit the offence under this section. He may be guilty under s. 193[4]. The offence of a person accusing another falsely of murder to a police officer in an enquiry under s. 174 of the Criminal Procedure Code would not fall under this section, the reason being that it is difficult to affirm the existence of an intention to cause or of knowledge that the false evidence is likely to cause a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible[5].

Where a witness stated on oath before the Sessions Court during the trial of the accused for murder, that another had committed the murder, whereas before ... he accused had committed it, ... der this section as he did not ... Where the accused brought before a Court a witness whom he had tutored to tell a false story concerning a murder case before it, it was held that he was guilty under this section[7].

2. 'Offence' means a thing punishable under the Code or any special or local law (s. 40).

3. 'Capital by the law of British India or England'.—The following offences are punishable with death under the Penal Code:—

(1) Waging war against the King (s. 121).

(2) Abetting mutiny actually committed (s. 132).

(3) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194).

(4) Murder (s. 302).

(5) Abetment of suicide of a minor, or insane or intoxicated person (s. 305).

[1] *Nim Chand Mookerjee* (18 3) 20 W R (Cr) 41.

[2] *Golaldas* (1874) Unrep Cr C 80, Cr R of 1874.

[3] *Ibid.*

[4] *Muhammad* (1886) P 1 \ 32 of 1886.

[5] *Muhammad Hayat* (1921) P W P (Cr) No 6 of 1922.

[6] *Hardyal* (180 ? Ber (A. Cr J) 35.

[7] *Sur M* ... 11 3

(6) Dacoity accompanied with murder (s. 396).

(7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s.307).

The following are capital offences under the English law :—

(1) High treason[1].

(2) Murder[2].

(3) Piracy with violence[3].

(4) Burning or destroying ships of war, arsenals, magazines, etc.[4].

(5) Several offences relating to the army and navy[5].

Amendment.—The words "by the law of British India or England" were substituted for the words "by this Code" by Act IX of 1890, s. 149.

PRACTICE.

Evidence.—Prove the same points as those for s. 193 and further—

That the accused when giving or fabricating the same, intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of capital offence under the Indian Penal Code, or under the English law[6].

For the second clause prove further—

(1) That capital punishment was carried into effect; and

(2) that the person executed was an innocent person.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which such Court is subordinate is required[7].

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, in the course of the trial of——, before——, gave false evidence (*or* fabricated false evidence) intending thereby to cause (*or* knowing it to be likely that you will thereby cause)——to be convicted of the offence of——which by the law of British India (*or* England) is capital, and thereby committed an offence punishable under s. 194 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As for whipping, see the Whipping Act (IV of 1909). As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2).

Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment.

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence[1] which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

1 30 Geo. III, c. 48; 54 Geo. III, c. 146; 33 & 34 Vic., c. 23, s. 31.

2 24 & 35 Vic., c. 100, s. 1.

3 7 Will. IV, and I Vic., c. 88, s. 2.

4 12 Geo. III, c. 24.

5 44 & 45 Vic., c. 58, ss. 4, 6 (1) 7, 8 (1), 9 (1), 12 (1); 29 & 30 Vic., c. 109, ss. 2-7, 10, 13, 19, 30, 34 and 52 (1).

6 *Naurang*, (1906) 3 A. L. J. 110 (*n*).

7 *Criminal Procedure Code*, s. 195. See also ss. 476-78, 487.

ILLUSTRATION

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine A, therefore, is liable to such transportation or imprisonment, with or without fine

COMMENT

This section is similar to the preceding section except as regards the gravity of the offence in respect of which perjury is committed It stands midway between s 193 and s 194

1. **'Offence'** means anything punishable under the Code or any special or local law (s 40)

Amendment.—The words ' by the law of British India or England ' were substituted for the words "by this Code ' by Act IX of 1890 s 119

CASES

Where the accused was convicted under this section for burning his house with the object of getting another convicted of the offence, and the act was done in a most open manner, and no complaint was made by the accused, it was held that the conviction could not be upheld, because there was no evidence of intention to convict[1] In the case of a person who burnt his own house, and charged another with the act, it was held that he should not be convicted under this section, but under s 211[2] But where A with a view of having B convicted, assisted in concealing stolen railway pins in his house and field it was held that A was properly convicted of an offence under this section[3] Where false coins were made by the accused only for the purpose of passing them secretly into the house of his enemy in order to get him into trouble it was held that he had committed an offence under this section also although he was guilty under s 232 or 235[4]

PRACTICE

Evidence —Prove the same points as for s 193 and further—

That the accused when giving or fabricating the same intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of an offence punishable with transportation for life (or imprisonment for a term of seven years or upwards) under the Indian Penal Code or the English law

To sustain a conviction it is not only necessary to prove that the accused spoke falsely, but also that he knew he was speaking falsely[5]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable — Triable by Court of Session

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required[6]

Charge —Similar to one under s 195 except that the offence is not capital but one punishable with transportation for life or imprisonment for a term of seven years or upwards

Punishment.—As for whipping, see the Whipping Act (IV of 1909) As to the Frontier District, see the Frontier Crimes Regulation (III of 1901)

[1] *Shib Dyal*, (1873) 5 N W P 188
[2] *Bhugwan Ahir* (1867) 8 W R (Cr) 65
[3] *Rameshar Rai* (1877) 1 All 379
[4] *Lal Chand* (1912) P W R (Cr) No 17 of 1912
[5] *A Gopalaswami* ? 6 M. 91
[6] Criminal Proc ? -

196. Whoever corruptly uses or attempts to use as true or genuine evidence[1] any evidence which he knows to be false or fabricated[2], shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

COMMENT.

This section makes it an offence to corruptly use any evidence which the person using it knows to be false or fabricated. There must, therefore, be knowledge of its falsity and in addition the element of corruption.

The section applies to those who make use of such evidence as is made punishable by ss. 193, 194, and 195. "It must be read with ss. 191 and 192, and can only apply to the use of evidence which was false evidence within the meaning of s. 191 or fabricated evidence within the definition laid down in s. 192"[1].

The section may include also the case of suborning false witnesses and attempting to use their evidence. There must be a use or an attempt or offer to use the evidence in a judicial proceeding or on some other occasion.

The section does not apply to subornation of perjury. It must be shewn that the accused made some use of the false evidence after it was in existence[3].

If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is evidence on which a jury may find that he solicited them: but the jury must be satisfied that he knew that the statement which they were called upon to make must be untrue to their own knowledge[8].

1. **'Corruptly uses or attempts to use as true...evidence'.**—The word 'corruptly' is applied to the doing of acts with the intent of gaining some advantage inconsistent with official duty or the rights of others[4]. It is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence. An intention to procure a false conviction is a corrupt intention[5]. The desire to screen an offender from the legal consequences of his act could well be designated a corrupt motive, and it would not require evidence to satisfy the Court that the witness in giving false evidence had that desire. The use of false evidence with the knowledge that it is false must ordinarily be corrupt from its very nature, and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough. An accused person who uses fabricated evidence as genuine in his defence may be liable for using it corruptly. In support of an *alibi* on a charge of assault the accused produced a cattle-pound receipt and called the Patil of another village to prove that he was there at the time of the offence. The defence was not believed, and the accused was tried for corruptly using false evidence as true. It was held that the accused was guilty of an offence under this section[6].

The document should have been corruptly used or attempted to be used as true or genuine evidence. The production of a document in compliance with an order of the Court does not amount to using the document as genuine within the meaning of the section. Where during the pendency of a suit instituted for the cancellation of certain documents which was subsequently decreed, the defendants disclosed in their affidavit of documents the documents in question and later pro-

1 Per Hutchins, J., in *Lakshmaji*, (1884) 7 Mad. 289, 290.

2 *Sheik Suffurruddee*, (1862) 1 Ind. Jur. (O. S.) 122.

3 *Gungammah*, (1860) 3 Mad. Ses.

4 Livingstone.

5 *Faza Ahmad*, (1913) P. R. No. 1 of 1914, P. L. R. No. 139 of 1914.

6 *Rama Nana Hagavne*, (1921) 23 Bom. L. R. 987, 6 Bom. Cr. C. 112.

if a capital offence,

if the offence for which the person was in custody or is ordered to be apprehended is punishable[5] with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,

if punishable with transportation for life or with imprisonment

if the offence is punishable[4] with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine,

and if the offence is punishable[5] with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both

'Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India, which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition[6], or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India, and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India

Exception —This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended

COMMENT

This section should be compared with s 212 Section 212 deals with the offence of harbouring an offender who having committed an offence absconds ... ender who has escaped from custody, ... with the offence or whose apprehension ... the eye of the law more aggravated, and a heavier punishment is therefore awarded to it It is thus an aggravated from of the offence punishable under s 212

1 **'Offence'.**—This word denotes here anything made punishable by the Code, or by any special or local law, when the thing made punishable by such law is punishable with imprisonment for six months or upwards (s 40)

2 **'Public servant'.**—See s 21, *supra*

3. **'Orders a certain person to be apprehended for an offence'** —This expression only means that the offence is the *causa sine qua non* of the apprehension It is an offence under this section to harbour or conceal a person for whose apprehension an order has been passed by a public servant, even when such apprehension is sought to be made not for the purpose of ... him ... offence that he may have committed but for enforcing a ... nt

inflicted on him for having committed the offence[1]. *It is sufficient to show that* against the person harboured, orders of apprehension had issued for an offence alleged against him, and the subsequent acquittal of the person harboured cannot affect the legality of a conviction under this section[2].

4. **'Harbours'.**—See s. 212, *supra*, and. s. 216-B, *infra*. The word 'harbour' does not only mean to provide shelter, food and clothing but includes "the assisting of a person in any way to evade apprehension"[3]. Making a sign to a person on the approach of the police to escape would fall within the purview of this section[4]. The mere giving of a meal to a gang of dacoits is not an offence within the meaning of this section, because in the absence of any evidence to that effect it cannot be held that the intention of the accused was to prevent them from being apprehended[5].

The word 'harbour' must be construed liberally. A man charged with an offence might to-day be found in the house of another, and although he might be living in the house owned by that other person, yet if for all practical purposes the harbouring was at the instance of some person not owning the house but visiting him, then this last person is, in law, a person harbouring the accused[6].

5. **'Punishable'.**—This word is used merely for the purpose of describing particular classes of offences in relation to which the punishment indicated in the section is to be inflicted; and it does not indicate that in a particular case the offence must have been punished[7].

6. **'Any law relating to extradition'.**—See p. 20 where the subject of extradition is discussed.

Amendment.—The paragraph above the Exception was inserted by Act X of 1886, s. 23.

PRACTICE.

Evidence.—Prove (1) that the person in question has been convicted of, or charged with, an offence.

(2) That such person was in lawful custody for the same.
(3) That such person escaped from such custody.
(4) That the accused knew of such escape.
(5) That he with such knowledge harboured, or concealed such offender.
(6) That he did so, with intent to prevent him from being apprehended.
(7) That the offence in question was punishable with (*a*) death, or (*b*) transportation for life or imprisonment for ten years, or (*c*) with imprisonment from one to ten years.

Or prove the following points:—
(1) That a person had been ordered to be apprehended.
(2) That such order was the order of a public servant.
(3) That such order was in the lawful exercise of his owners.
(4) That the accused knew of such order for apprehension[8].
(5), (6), (7) } As above.

It must be shewn that the warrant to arrest the alleged offender was a legal one[9].

1 *Satanji Koer*, (1909) 11 C. L. J. 109.
2 *Rangasami Goundar*, (1928) 52 Mad. 73.
3 *Sarwan Singh*, (1922) 5 L. L. J. 329.
4 *Balkaran Singh*, (1925) 26 Cr. L. J. 1288.
5 *Hukam Singh*, (1924) 6 L. L. J. 481.
6 *Bhujabali Akappa Gorwadi*, (1912) 14 Bom. L. R. 583, 1 Bom. Cr. C. 151.
7 *Satanji Koer*, (1909) 11 C. L. J. 109.
8 *Harnam Singh*, (1924) 6 L. L. J. 478.
9 *Shripad Chandavarkar*, (1927) 30 Bom. L. R. 70, 9 Bom. Cr. C. 175, 52 Bom. 151.

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class if the case comes under the first or second clause, by Magistrate, Presidency or first class, or by Court by which the offence is triable, if the case comes under the third clause

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That on or about the——day of——, at——, one AB was charged with or convicted of an offence under s ——by the Court of——[*or* one AB was ordered to be apprehended for an offence punishable under s ——by——a public servant in the exercise of his lawful powers as such public servant] and that you knowing of the escape of AB (*or* knowing of the said order for apprehension) on the——or about——day of——, at——, harboured or concealed AB with the intention of preventing him from being apprehended and that you thereby committed an offence punishable under s 216 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session)

And I hereby direct that you be tried [by the said Court] on the said charge

Punishment —Under the Frontier Crimes Regulation[1] a person convicted of an offence under this, or the next, section may be sentenced, in lieu of or in addition to fine, to imprisonment or transportation for not more than seven years

The fact that the person harboured has been acquitted, may be taken into consideration in awarding sentence[2]

216A. Whoever, knowing or having reason to believe[1] that any persons are about to commit or have recently committed robbery[2] or dacoity[3], harbours[4] them or any of them, with the intention of facilitating the commission of such roberry or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine

Penalty for harbouring robbers or dacoits

Explanation —For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India

Exception —This provision does not extend to the case in which the harbour is by the husband or wife of the offender

COMMENT.

This section was inserted by Act III of 1894, s 8 It is specially enacted with a view to enable the Court to inflict enhanced punishment where the persons harboured are robbers or dacoits or where they intended to commit robbery [illegible] this section should be [illegible] persons who intend to

Section 212 is a general provision, and an offence under s 216A will be an offence under s 212 But in the case of robbers or dacoits this section must be applied

To justify a conviction under this section both knowledge and intention [illegible] required[4]

[1] III of 1901, s 11 (3) (*d*) and 12 (2).
[2] *Rangasami Goundan*, (19?8) 52 Mad 73.
[3] *Sunderdas*, (1924) 19 S L R 111
[4] *Sakharam* (1895) Cr R. No 39 of [illegible] Unrep Cr C 775

of the house it was held that he had committed an offence under this section[1] The Lahore High Court differing from the view of the Calcutta High Court It h in formation to the police with respect to the approach of police in order that the said offender may make good his escape that person is guilty of the offence of harbouring The accused was found sleeping at his threshing floor on the same cot with a proclaimed offender and, when questioned by the police replied that his companion was his guest and nephew This information was false and was given in order that the offender might not be arrested It was held that the accused was guilty of harbouring within the meaning of this section[2]

Where a proclaimed offender was arrested in the act of cooking his meals at the place of a village Zemindar and the Zemindar was present at the time of the arrest he was held to have harboured the offender with the knowledge that he was such and with the intention of preventing his apprehension within the meaning of this section[3]

Where the accused had lent to some dacoits his pony merely to facilitate them in removing the loot, the Allahabad High Court held that the applicant could not be charged under this section with having harboured the dacoits[4] This case does not seem to lay down sound law for the lending of the pony would come within the words supplying a person with means of conveyance

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture

217 Whoever, being a public servant[1], knowingly disobeys any direction of the law[2] as to the way in which he is to conduct himself as such public servant intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment[3], or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

COMMENT

This section and the three following sections deal with disobedience on the part of public servants in respect of official duty Their proper place is in Chapter IX

1 **'Public servant'** —See s 21, *supra*

2 **Direction of law'** means a positive direction of law such as those contained in ss 89 and 90 of the Criminal Procedure Code and cannot be made to extend to the more general obligation by which every subject is bound not to stifle a criminal charge [5] Before a person can be convicted under this section it must be shown that there is a direction of law as to the way in which he is to conduct himself as such public servant and this direction must be a direction to be found in some positive statute of some rules or regulations which are declared by statute to have the force of law[6] Where a police constable retained for him-

31 [4] *Damri* (19?4) 22 A. L. J 490.
[5] Ler Tı C. I *Kamaskhi Nayar,*
(18) 1 ? 11 \
(n). [6] *R.*

self a piece of gold found in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officer under s. 523 of the Code of Criminal Procedure, it was held that he was guilty of an offence under this section[1].

3. 'Intending thereby to save...any person from legal punishment'.—"It appears to me quite sufficient for the purpose of a conviction under s. 217, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment...a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment"[2]. Thus, the actual guilt or innocence of the alleged offenders is immaterial, if the accused believes they are guilty, and intends to screen them[3].

'Legal punishment' does not include departmental punishment[4].

Where several persons were apprehended at night time on suspicion of having committed culpable homicide, the police-officer tied them together by the hands, and kept them in the village in which they had been arrested, instead of at once taking them to the nearest police-station. The prisoners escaped in the course of the night. It was held that the police-officer did not commit an offence under this section, because his intention in keeping the prisoners in the village was merely to wait until it was more convenient to start, and the disobedience of the rule of law was, therefore, not such a disobedience as this section contemplates[5].

The accused, a Police Patel, on a complaint having been made to him that an attempt had been made to commit rape on a girl, made some investigation, prepared a *panchnama* of the scene of the offence, and arrested the two persons against whom the accusation was laid. He sent them with a report to the police-station, but on the way the parties came to a settlement and all returned to the village. The complainant informed the Patel that he had no desire to continue the proceedings, whereupon the Patel tore up the *panchnama* which he had made. For this destruction the Patel was convicted of an offence under this section. It was held, acquitting the Patel, that it could not be fairly said that he knowingly disobeyed any direction of the law as to the way in which he should conduct himself or that he intended or knew it to be likely that by tearing up the *panchnama* he would save any person from legal punishment[6].

A conviction under this section of a village *vetti* for allowing a person who had been sentenced by a Village Magistrate to escape on the way to the lock-up was held to be bad[7].

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he conducted himself in the particular manner charged.

(3) That such conduct was in the exercise of his duties as such public servant.

(4) That such conduct was in disobedience to a direction of law.

(5) That when the accused disobeyed such direction of law, he did so knowingly.

1 *B. Dasappa*, (1914) 16 Cr. L. J. 453.
2 *Amiruddin*, (1878) 3 Cal. 412, 413.
3 *Hurlal Surma*, (1867) 8 W. R. (Cr.) 68.
4 *Jungle Lall*, (1873) 19 W. R. (Cr.) 40.
5 *Ootum Chund*, (1871) P. R. No. 18 of 1871.
6 *Naranbhai Bhulabhai*, (1913) 15 Bom. L. R. 578, 2 Bom. Cr. C. 90.
7 *Bodapati Pentadu*, (1882) 1 Weir 197.

(6) That when he was guilty of such disobedience he intended to, or knew that it was likely that he wou [illegible] from punishment, or subject some person to a [illegible] ich he was entitled, or (b) some property from [illegible] liable, or (c) that such punishment, etc, was legally enforceable, or that such forfeiture, or charge, was a legal liability.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class

Charge.—It should distinctly state what the direction of law was[1] It should run as follows —

I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That on or about the——day of——, at——, you being a public servant knowingly disobeyed the direction of the law as to the way in which you were to conduct yourself as such public servant, to wit——, (*specify the direction of law*) [illegible] thereby [illegible] in that [illegible] there by to save some property, to wit——, from forfeiture (*or* any charge to which it is liable by law)] and that you thereby committed an offence punishable under s 217 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing[1], frames that record or writing in a manner which he knows to be incorrect[2], with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person[3], or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment[4], or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section deals with the intentı [illegible] object of saving or injuring any person [illegible]

Ingredients.—This section has three essentials—

1 The offender must be a public servant charged with the preparation of a record or writing

2 He must have framed that record or writing incorrectly.

3. He must have done so with intent to cause or knowing it to be likely that he will thereby

[1] *Baban Khan valad Mhaskoji*, (1877) 2 Bom 14[illegible].

[1] *Shama Churn Roy*, (1867) 8 W. R. (Cr) 2[illegible]

(a) cause loss or injury to the public or any person, or
(b) save any person from legal punishment, or
(c) save any property from forfeiture or other charge to which it is legally liable.

1. **'Whoever being a public servant...charged with the preparation of any record, etc.'**—The word 'charge' is not restricted to the narrow meaning of "enjoined by a special provision of law". So where a District Superintendent of Police usually required a first information and special diary in gambling cases, it was held that a Sub-Inspector who was given a warrant to arrest certain persons but who framed the information and the diary incorrectly to save two persons from punishment was properly convicted of having committed an offence under this section as he was charged with the preparation of such record within the meaning of it[1]. The public servant framing an incorrect record must have been charged with the preparation of it.

A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. It was held that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under this section[2].

2. **'Frames that record or writing in a manner which he knows to be incorrect'.**—It is essential that the record must have been incorrectly made.

3. **'With intent to cause...loss or injury to the public or to any person'.**—The section contemplates the wilful falsification of a public document with intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected. The accused must not be convicted on a remote and speculative chain of possibilites, otherwise the most innocent acts might, by the exercise of a little ingenuity, be perverted into the initial steps of great crimes[3]. Where the accused was charged with having prepared false work bills and the only evidence against him was that he had transposed some men's work from certain days to other days, it was held that the evidence was not sufficient[4]. Where a *chowkidar* was charged with having made a false entry in a *chowkidaree* attendance book, with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another *chowkidar*, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within this section[5]. S was charged with the preparation of a certain record, and was in the habit of preparing it from certain abstracts made and read to him by D. D made and read false abstracts whereby an incorrect record was prepared. It was held that D could not be held to have committed this offence but was guilty of abetting it[6].

It is not necessary that the incorrect document should be submitted to another person, or be otherwise used by the writer; it is sufficient if it is shown that it has been prepared by a public servant charged with its preparation, in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause loss to the public. If, after such preparation, he submits the document, with intent to procure credit for a payment of more than to his knowledge is due to him, all the elements of an attempt to cheat in its simple or aggravated form (ss. 417, 418) would be present; but it does not follow that, because there was

1 *Deodhar Singh*, (1899) 27 Cal. 144.
2 *Mazhar Husain*, (1883) 5 All. 553; *Meharban Ali Khan* v. *Sita Ram*, [1929] A. L. J., 512.
3 *Ramachandra*, (1884) Unrep. Cr. C. 201.
4 *Ibid.*
5 *Jungle Lall*, (1873) 19 W. R. (Cr.) 40.
6 *Brij Mohan Lal*, (1875) 7 N. W. P. 134.

not a complete attempt to cheat, there was no complete offence[1]. As to the definition of 'injury', see s 44, *supra*.

4. **'With intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment'.**—The words 'any person' mean a person other than the public servant or the public servant himself. If the legislature had intended that this section should only apply when the intention was to save some person other than the public servant, it would have been easy to insert the word "other" between the words "any" and "person" A public servant who does that which, if done to save another from legal punishment, would bring the public servant within this section, has equally committed the offence punishable under this section if the person whom he intends to save from legal punishment is himself[2]

[illegible] punishment[3] [illegible] of the course [illegible] ecessary even to prove the intention to screen any particular person It is sufficient that he knows it to be likely that justice will not be executed and that some one will escape punishment for the offence"[4]

Actual commission of offence not necessary.—The actual guilt or innocence of the alleged offender is immaterial if the accused believes him guilty and intends to screen him[5] It is necessary to prove that the accused believed or had reason to believe, that the person concerned had committed an offence, though it is not necessary to prove that such an offence had, as a matter of fact, been committed It is quite sufficient that the commission of a cognizable offence has been brought to the notice of the accused officially and that in order to screen the offender he prepared the record in a manner which he knew to be incorrect[6].

CASES.

Public servant framing incorrect record to save a person from legal punishment.—A *kulkarni* who made a false report with reference to an offence committed in his village with intent to save the offenders from punishment was held to have committed this offence[7] Where it was proved that the accused's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, it was held that he had committed this offence[8]

A report of the commission of a dacoity was made at a *thana* The police officer in charge of the *thana* took down the report which was made to him, but subsequently destroyed the report and framed another and a false report of the commission of a totally different offence to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant It was held that the police officer was guilty of offences punishable under s 204 and this section[9]

Where a [illegible] in that he enterec [illegible] beaten by dacoit [illegible] it was held that this was not sufficient to sustain a conviction under this section

1 *Megraj*, (1880) P. R No 13 of 1881

2 *Nand Kishore*, (1897) 19 All 305, overruling *Gauri Shanker*, (1883) 6 All 42

3 *Hurdut Surma*, (1867) 8 W R (Cr) 68

4 Per Pratt, J, in *Amirkhan Mahamad khan*, (1921) 23 Bom L. R 823, 829 6 Bom Cr. C. 72. Fawcett, J, refrained from expressing any opinion on the point whether it is unnecessary to prove an intention to screen any particular person

5 *Krishnaji*, (1888) Unrep Cr. C. 405

6 *Moti Ram*, (1925) 7 L. L. J 331, 26 P L. R 594.

7 *Malhar Ramchandra*, (1870) 7 B. H. C. (Cr C) 64

8 *Girdhari Lal*, (1886) 8 [illegible]

9 *Muhammad Shah* [illegible] 20 [illegible] 307

But where, he, without endeavouring to enquire into the truth of the said entry in his diary, destroyed certain records which falsified it and substituted fresh note-books, his bona fides were open to question and he was deemed to have framed an incorrect public record intentionally[1]. "Where a Station House Officer, in order to support the Inspector, made a false entry in his diary, that the four cartmen stated to him as they had said before the Inspector", he was guilty of framing an incorrect public record intentionally when it appeared from the evidence that he took no action on the complaint of the cartmen, and his statement that no complaint of dacoity was made to him, was falsified by his own witness[2].

The accused, a Head Constable, whilst investigating a complaint of theft, searched the house of the suspect and found there a piece of cloth and a bodice which the complainant said belonged to him. Statements made by the complainant and his wife claiming the property to be theirs were taken down. The complainant produced from his house some clothes of his own for comparison. Panchnamas were made of the search and the comparison. Subsequently, these papers were suppressed, and the accused prepared statements, purporting to have been made by the complainant and his wife withdrawing the complaint; and a Panchnama of the property produced by the complainant which was wrongly supposed to have been stolen from his house was made. The accused was charged with offences punishable under s. 201 and this section. It was held that the accused had not committed an offence under s. 201, but that he was guilty of an offence punishable under this section[3].

Incorrect record framed without any of the objects mentioned in this section.—A village Munsif who submitted a false calendar in which he purported to have convicted certain persons of theft was not guilty under this section[4].

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he was charged with the preparation of record or other writing in his capacity as a public servant.

(3) That he framed such record or other writing in an incorrect manner.

(4) That he then knew that he was framing it in an incorrect manner.

(5) That he did as above with the intent or with the knowledge that it was likely that he would thereby (*a*) cause loss or injury to the public, or any person; or (*b*) save a person from punishment; or (*c*) save some property from forfeiture or charge.

(6) That such punishment was legally enforceable, or that such charge or forfeiture was a legal liability.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That on or about the——day of——, you being a public servant charged with the preparation of a record (*or* writing, to wit——, framed the said record (*or* writing) in a manner which you knew to be incorrect——(*specify the incorrect statement*) and which you made with intent to cause (*or* knowing it to be likely that you will thereby cause) loss (*or* injury) to public [(*or* to any person, to wit——(*or* with intent thereby to save *or* knowing it to be likely that you will thereby save any person from legal punishment *or* with intent to save *or* knowing that you are thereby likely to save any property, to wit——) from forfeiture to which it was

[1] *Ramaswami Iyengar*, [1911] 2 M. W. N. 44.
[2] *Pasupuleti Ramdoss*, [1911] 2 M. W. N. 64.
[3] *Anverkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 6 Bom. Cr. C. 72.
[4] *Chinnakannu Udayan*, (1899) 1 Weir 197.

liable by order of the Court in case No ——of——] and that you thereby committed an offence punishable under s 218 of the Indian Penal Code and within the cognizance of the Court of Session

And I hereby direct that you be tried by the said Court on the said charge

Public servant in judicial proceeding corruptly making report etc contrary to law

219 Whoever, being a public servant[1], corruptly[2] or maliciously[3] makes or pronounces in any stage of a judicial proceeding,[4] any report, order, verdict or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT

This section must be read with s 77, it contemplates some wilful excess of authority, in other words, a guilty knowledge superadded to an illegal act Knowledge that the commitment is contrary to law is a question of fact and its existence or non existence must be inferred from the circumstances of each case[1] This and the next section deal with corrupt or malicious exercise of the power vested in a public servant for a particular purpose

1 **'Public servant'** —See s 21, *supra*

2 **'Corruptly'** —See s 196, as to the meaning of this word

3 **'Maliciously'.**— Malice in common acceptation means ill-will against [illegible]

of another[5] Where any person wilfully does an act injurious [illegible] lawful excuse he does it 'maliciously'[2] Whether a person [illegible] maliciously is a question of fact and must be proved Proo [illegible] ment to confinement will not of itself warrant the legal [illegible][6] a village Munsif passed a decree which was contrary [illegible] was guilty under this section of maliciously pron[illegible]

4 **'Judicial proceeding'** —See s 193 [illegible]

PRACTICE

Evidence —Prove (1) that the accus[illegible]

(2) That he made or pronounced [illegible]

(3) That he did as in (2) corru[illegible]

(4) That such report, order, [illegible] in the course of a judicial proceed[illegible]

(5) That such report etc [illegible]

(6) That when the accu[illegible] contrary to law

1 *Narayan Babaji* (18[illegible]) [illegible]

2 Per Bayley J in [illegible] (182[illegible]) 4 B. & C. 247 [illegible]

3 *Ward* (1871) L. R. 1 C. C. R. [illegible]

4 Per Bowen L. J [illegible]

5 *McGregor Gow & Co.* [illegible]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.

220. Whoever, being in any office[1] which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously[2] commits any person for trial or confinement or keeps any person, in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law[3], shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section is a further extension of the principle laid down in the preceding section. It is general in its application whereas the last section applies to judicial officers. It is intended to prevent illegal commitments for trial or illegal confinement.

1. 'Being in any office'.—The section applies to those who hold certain offices and not to private persons who have, under certain circumstances, the right to confine persons accused of certain offences[1]. Private persons, if they abuse their power, cannot be dealt with under this section.

2. 'Maliciously'.—Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice[2].

It is only when there has been an excess, by a police-officer, of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law. Where the arrest is legal, there can be no guilty knowledge "superadded to an illegal act", such as it is necessary to establish against the accused to justify a conviction under this section[3].

3. 'Knowing that in so doing he is acting contrary to law'.—Knowledge that such commitment is contrary to law is a question of fact and not of law and must be proved in order to satisfy the requirement of this section[4].

PRACTICE.

Evidence.—Prove (1) that the accused held an office, which empowered him to (*a*) commit persons for trial; or (*b*) commit persons to confinement; or (*c*) keep persons in confinement.

(2) That he committed a person for trial or to confinement, or kept a person in confinement in exercise of such powers.

(3) That he, in doing as above, was acting contrary to law.

(4) That he at the time knew that he was acting contrary to law.

(5) That he when doing as in (2) also acted corruptly or maliciously.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

1 See ss. 59 and 60 of the Code of Criminal Procedure.

2 *Narayan Babaji*, (1872) 9 B. H. C. 346.

3 *Amarsang Jetha*, (1885) 10 Bom. 506; *Behary Singh*, (1867) 7 W. R. (Cr.) 3.

4 *Narayan Babaji*, sup.

221 Whoever, being a public servant[1], legally bound[2] as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence,[3] intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say—

Intentional omission to apprehend on the part of public servant bound to apprehend

with imprisonment of either description for a term which may extend to seven years, with or without fine if the person in confinement or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death, or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years

COMMENT

This and the two following sections deal with the omission to apprehend the escape of offenders

1. **'Public servant'** —See s 21, *supra*

2 **'Legally bound'** —See s 43, *supra* There must be a legal obligation to apprehend or to keep in confinement any person charged with an offence A

a person accused

lar such a person

him in the act of

e refuse to appre

, is not punishable under this section[1]

3 **'Offence'** —A thing punishable under the Code or under any special or local law (s 40)

Special Act —Where a police officer allowed a prisoner to escape from his custody while he was on duty as sentry it was held that he could not be convicted under Act V of 1861, but under this section[2]

PRACTICE

Evidence —Prove (1) that the accused is a public servant

(2) That the person in question had been charged with that such person was liable to be apprehended for an offence

[1] *Kallu* (1880) 3 All 60 [2] *Futteh Khan* (1874)

(5) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.

(6) That he did so intentionally.

Procedure.—Not cognizable—Warrant—Not bailable if the case is punishable under the first or second clause; bailable if under the third clause—Not compoundable—Triable by Court of Session, if the case falls under the first or second clause; by Court of Session or Magistrate, Presidency or first class, if it falls under the third.

Charge.—I (*name and office of Magistrate, etc*),. hereby charge you (*name of accused*) as follows:—

That you, being a public servant, to wit——, and being as such public servant legally bound to apprehend (*or* keep in confinement) one AB, who was, on or about the——day of——, at——, under the sentence of the Court of——for the offence of——[*or* who was lawfully committed to custody by——] did intentionally omit to apprehend the said AB [*or* intentionally suffer the said AB to escape, *or* intentionally aid the said AB in escaping or attempting to escape from such confinement] and that you thereby committed an offence punishable under s. 222 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Escape from confinement or custody negligently suffered by public servant.

223. Whoever, being a public servant[1] legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody,[2] negligently suffers such person to escape from confinement[3], shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section further extends the principle laid down in the two preceding sections. It punishes a public servant who negligently suffers any person charged with an offence to escape from confinement. The last two sections dealt with intentional omission to apprehend such person.

Scope.—This section applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested, under civil process[1]. The latter cases come under s. 225-A.

Ingredients.—The section has three essentials—

1. The offender must be a public servant.
2. He must be legally bound to keep in confinement a person charged with or convicted of an offence or lawfully committed to custody.
3. He must negligently suffer such person to escape.

1. 'Public servant'.—See s. 21, *supra*. The expression includes a convict warder[2], or a *rakha*[3], but not a village *vetti*[4].

2. 'Legally bound...to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody'.—See s. 43, *supra*. as to the meaning of 'legally bound'. The public servant must be legally bound to keep in confinement. A village policeman is nowhere authorized to take charge of convicted prisoners. Where, therefore, a convicted prisoner

1 *Tafaullah*, (1885) 12 Cal. 190.

2 *Kallachand Moitree*, (1867) 7 W. R. (Cr.) 63 [99]; *Oodaji*, (1888) Unrep. Cr. C. 389.

3 *Fula Bhana*, (1888) Cr. R. No. 40 of 1888, Unrep. Cr. C. 388.

4 *Bodapati Pentadu*, (1882) 1 Weir 197.

escaped from the custody of a village policeman, it was held that he was not guilty of an offence under this section[1]

'Offence'.—'Offence' means a thing punishable under the Code or under any special or local law (s 40)

'Lawfully [illegible]
is committed If [illegible]
not be guilty of [illegible]
The police of a *Native State arrested in British territory a person suspected of* having committed an offence in that State, and made him over to a *chowkidar* from whose custody he escaped It was held that as neither the original arrest nor the subsequent custody by the *chowkidar* were lawful, the *chowkidar* could not be convicted under this section[2].

3. **'Negligently suffers such person to escape from confinement'.**—Before a person can be convicted of having negligently suffered a prisoner to escape it must be shown not only that he was guilty of negligence, but that the escape was at least the natural and probable consequence of his negligence It must be shown that the escape was directly due to negligence Where an officer in charge of a police station was ordered to despatch certain prisoners and he left the station ordering the Head Constable to despatch them and on the way the prisoners escaped, it was held that the negligence of the officer in charge was too remotely connected with the escape and he could not be convicted under this section[4] Where the accused marched a prisoner after sunset, contrary to the directions of the Magistrate, and the prisoner was rescued, it was held that no offence under this section was made out[5] Certain Police Constables were conveying a dangerous prisoner in a camel cart The Constables had put on the prisoner two sets of hand cuffs One set bound his hands together and by the other set he was bound to a side of the camel cart There was also a rope round the prisoner's waist During the course of the journey the accused asked to be let [illegible]
The prisoner raised a sudden alarm of a snake and in the momentary confus[illegible] The [illegible] policemen were not guilty [illegible]
under this section[6].

'Escape from confinement'.—" It seems [illegible] 225, has used the words confinement and custody [illegible] by them one and the same thing, regarded from [illegible] cannot hold that the expression 'escape from [illegible] its application to escape from the particular [illegible] the prisoner was subjected or in which he was [illegible] rence'[3] The accused were keeping guard [illegible] condemned prisoners were confined When [illegible] the prisoners under their charge were [illegible] subsequently discovered crouching on the [illegible] re captured It was held that the [illegible]

1 *Jaglia Raysing*, (1899) 1 Bom. L. R. [illegible]
2 *Debi* (1907) 29 All 377 See to the same [illegible] effect *Choghatta*, (1891) P R No 29 of [illegible]
3 *Debi*, *ibid* See to the same effect [illegible] *ghatta*, *ibid*.
4 *Durga Prasad*, (1910) 7 A. L. J. [illegible]
5 *District Magistrate of* [illegible]

'the prisoners were still in 'confinement' when crouching upon the roof of their cells, inasmuch as they were still within the prison walls and were not at liberty. An attempt to escape from confinement had no doubt been made, but negligently suffering such an attempt is not an offence within the provision of s. 223"[1]. A Magistrate, acting upon a petition, arrested and took the statement of the prisoner. He then sent the prisoner to a police-officer for investigation and report, who allowed the prisoner to go at large. It was held that the Magistrate's order might be taken to have been passed under s. 167, Criminal Procedure Code, and therefore the prisoner was lawfully committed to the custody of the police; that the officer was bound to detain him in custody until released therefrom by due course of law, and that the officer, having negligently suffered the prisoner to escape, was guilty under this section[2]. The accused, a *daffedar* in charge of one of the postern gates of a jail, suffered certain convicts to pass out of the gate at which he was stationed, not intending that they should escape but to allow of their having an interview with their friends. The convicts taking advantage of accused's over-confidence effected their escape. It was held that the accused committed this offence[3]. The accused, a warder, was placed in charge of a gang of fifteen prisoners and sent off to do agricultural work. In contravention of his orders he allowed two of the prisoners to go off to the cemetery in charge of a convict warder in order to water trees there. The cemetery was at some distance and not within sight, nor did the accused attempt to patrol in that direction. It was held that the accused had committed an offence under this section[4].

Amendment.—The words "or lawfully committed to custody" were added by Act XXVII of 1870, s. 8.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That the person in question was charged with or convicted of an offence.

(3) That the accused was legally bound to keep such person in confinement.

(4) That he suffered such person to escape therefrom.

(5) That he acted negligently when suffering such persons to escape.

Or prove (1) that the accused is a public servant.

(2) That the person in question had been committed to custody.

(3) That such commital was lawful.

(4) That the accused was legally bound to keep in confinement such person under such committal.

(5) That he suffered such person to escape from confinement.

(6) That he acted negligently when suffering such escape.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, being a public servant, to wit——, and as such public servant legally bound to keep in confinement one AB who was charged with the offence of——, under section——, of the Indian Penal Code, (*or* convicted of, *or* lawfully committed to custody) negligently suffered the said AB to escape from confinement, and that you thereby committed an offence punishable under s. 223 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

1 Per Rivaz, J., in *Albel Singh*, (1890) P. R. No. 32 of 1890.
2 *Ashraf Ali*, (1883) 6 All. 129.
3 *Ghulam Ali*, (1883) P. R. No. 19 of 1883.
4 *Ashan Ali*, (1918) P. R. No. 11 of 1919.

224 Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or any offence with which he is charged[1] or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence[2], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Resistance or obstruction by a person to his lawful apprehension

Explanation —The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he *was charged, or of which he was convicted*

COMMENT

This and the section following relate to resistance or illegal obstruction offered to the lawful apprehension of any person Sections 221 223 punish public servants who fail to apprehend or confine persons liable to be apprehended or *confined*

Scope —This section punishes the persons who offer resistance or obstruction

Ingredients —The section deals with two kinds of offences—

1 Resistance or illegal obstruction by a person to his lawful apprehension for any offence with which he is charged

2 Escape or attempt to escape by a person from lawful custody for the offence with which he is charged or of which he has been convicted

1 **'Resistance or illegal obstruction to the lawful apprehension for any offence with which he is charged'** —Trivial resistance to unlawful *force* on the part of an arresting officer does not constitute an offence under this section[2]

The accused committed contempt of Court and was ordered into custody by the presiding Magistrate He resisted the arrest, but was ultimately arrested in a Court on a warrant issued by the Magistrate and was tried and convicted of the offence of resisting lawful arrest It was held that the conviction was legal[3] Where the accused having been sentenced to imprisonment by a village Magistrate refused to submit to the sentence and went away, and the evidence did not show that any proper attempt was made to arrest her, it was held that the conviction under this section was bad[4]

'Illegal obstruction' —The simple evading of arrest does not amount to resistance or illegal obstruction to lawful apprehension[5] As to the word illegal see s 43, *supra*

'Offence' — Offence means a thing punishable under the Code or any special or local law (s 40) Escapes by parties detained for offences not punishable under the Code are punishable under this section[6]

'Charged'.— An arrest of a person by an officer authorized in that behalf is a charge, that is, an imputation of the alleged offence though but a prima *facie*

[1] *Akanu Kori*, (1923) 18 S L R 301 24 Cr L J 462

[2] *Tan Sein* (1901) 1 L B R 173.

[3] *Mahommed Kassim*, (1881) 1 Weir 204

[4] *Nooruboobu* (1862) 1 Weir 204

[5] *Nanjan* (1858) 1 Weir 205

[6] (1866) 3 M H C 11

imputation until the case goes before some functionary authorized to deal with it[1]. The word "charged" is used in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial[2].

2. **'Escapes or attempts to escape from any custody in which he is lawfully detained for any such offence'.**—A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escape. Thus, where a person, having been legally arrested, was subsequently left unguarded and he escaped, it was held that he was guilty under this section[3]. Manual detention is not essential to constitute arrest[4].

'Custody in which he is lawfully detained'.—In construing these words regard must be had to the nature of the custody itself as well as to the circumstances under which the authority to arrest and keep in custody arises[5]. The mere fact that a constable in charge of the accused, who was detained in a jail, became insensible was held not to determine the lawful custody of the accused[6].

Where a person, apprehended on a charge of a cognizable offence, escapes from lawful custody, his liability to punishment is not affected by the circumstance that a competent Court determines his offence to be other than that with which he has been charged. But, if charged with a non-cognizable offence, the police-officer who apprehends him without warrant does not have him in lawful custody, and *his escape is not punishable under this section*[7].

A person is not in lawful custody if the person apprehending him or causing his apprehension has no power to arrest[8], or if he is arrested on a warrant, not lawfully signed[9], or by a person who cannot legally arrest, e.g., *a chowkidar*[10], or if he is kept in confinement for inflicting illegal punishment[11].

Cases.—A person of the same name as the offender was arrested, tried and acquitted. Whilst under arrest the accused escaped from custody. It was held that he was not liable to conviction under this section[12]. Where a prisoner escaped from lawful custody while on his way to undergo a sentence of transportation, he was held liable under this section and not under s. 226[13]. Escape from custody by a thief, who had been caught by a private person in the very act of stealing, at a time when the thief was being sent to the nearest police-station in custody of a person, who had not witnessed the offence, was held to be an offence under this section[14]. A prisoner in a jail was employed in brickfields outside the jail. While so employed he endeavoured to escape, but was re-captured. It was held that he had committed an offence under this section[15]. A process-server went to the village of the accused and told him that he had a warrant for him and took him before the village Magistrate, who then read out the warrant to the accused. The process-server informed him that he should pay the amount. The accused's offer to pay a less sum than

1 *Kutia Alu*, (1886) Unrep. Cr. C. 298, Cr. R. No. 46 of 1886.

2 *Kalia Amra*, (1926) 29 Bom. L. R. 168, 9 Bom. Cr. C. 16.

3 *Muppan*, (1895) 18 Mad. 401; *Kalia Amra*, (1926) 29 Bom. L. R. 168, 9 Bom. Cr. C. 16.

4 *Nanjan*, (1888) 1 Weir 205.

5 (1878) 1 Weir 199.

6 *Saudeya Gounden*, (1890) 1 Weir 203.

7 *Ram Saran Tewari*, (1875) 24 W. R. (Cr.) 45. See Also *Chakua*, (1896) 16 A. W. N. 151.

8 *Rur Singh*, (1885) P. R. No. 21 of 1885; *Bojjigan*, (1882) 5 Mad. 22; *Kalian*, (1896) 19 Mad. 310; *Lajje Ram*, (1898) P. R. No. 12 of 1898; *Pandaram Thulkanam*, (1883) 1 Weir 205.

9 *Rur Singh*, sup.; *Mousi Lal*, (1918) 5 P. L. W. 226.

10 *Purna Chandra Kundu*, (1913) 41 Cal. 17.

11 *Uppala Kotayya*, (1915) 18 M. L. T. 310.

12 *Ganga Charan Singh*, (1893) 21 Cal. 337. See *Johri*, (1901) 23 All. 266, where the escape was from the custody of an officer who had no right to arrest the accused as the offence was not committed in his presence.

13 *Ramasamy*, (1868) 4 M. H. C. 152; *Nga Po Chein*, (1911) 4 B. L. T. 261.

14 *Potadu*, (1888) 11 Mad. 480; *Fakira*, (1893) 17 Mad. 103.

15 *Hasan Ali*, (1894) 14 A. W. N. 176.

that mentioned in the warrant having been refused, he ran away It was held that the accused was duly arrested and was in the custody of the process server at the time he made his escape[1]

'For any such offence'.—These words mean, for any offence with which a person is charged or of which he has been convicted So that it will be an offence for a man to escape from custody after he has been lawfully arrested on a charge of having committed an offence although he may not be convicted of such latter offence An accused person is no less guilty than a convicted person, if he escapes from lawful custody[2] Escape from custody when such detention is not for an offence is not punishable under this section[3]

An escape from custody, when a person is being taken before a Magistrate for the purpose of being bound over to keep good behaviour, is not punishable under this section[4] for in such a case he is not in custody for an offence He could however be punished under s 225 B

Escape with consent.—Even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law[5]

Police-officer should show the authority under which he is acting.—It may be desirable or even obligatory that if called upon the police officer making an arrest should show the person arrested the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the legislature has thought proper to declare it[6]

An endorsement in a warrant of arrest should be made properly in accordance with law If it is made only by initials which are proved or identified to be of the proper person the warrant does not become invalid by reason merely of its being initialled[7]

PRACTICE

Evidence.—When the offence charged is that of resistance to apprehension, prove—

(1) That the accused is charged with an offence
(2) That he offered resistance or obstruction to his apprehension
(3) That such resistance or obstruction was illegal
(4) That the accused offered it intentionally

When the offence charged is that of escape from custody, prove—

(1) That the accused had been charged with or convicted of an offence
(2) That he was detained in custody
(3) That such detention in custody was in respect of such charge or conviction
(4) That such detention in custody was lawful
(5) That the accused escaped from such custody or attempted to do so
(6) That the accused did so intentionally.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class

[1] *Venkatachela Samban*, (1892) 1 Weir 206
[2] *Deo Sahay Lal*, (1900) 28 Cal 253 255, *Mohammed Kazi*, (1916) 43 Cal 1161, *Kalia Amra*, (1926) 29 Bom L. R. 168, 9 Bom Cr C. 16, *Po Hla*, (1906) 12 Burma L. R. 240, 3 L. B. R. 221
[3] *Ganga Charan Singh*, (1893) 11 Cal 337
[4] *Shashi Churn Napit*, (1882) 8 Cal 331 *Kandhaia*, (1884) 7 All. 67, (1874) 7 M. H. C. App. 41
[5] 1 Russell, 318, Roscoe, 551
[6] *Basant Lall*, (1900) 27 Cal. 320
[7] *Abdul Sildar v Singh* 5 C. W. N. 447

Venue.—A charge of having escaped from custody may be inquired into and tried wherever the person happens to be when the charge is made[1].

Punishment.—The punishment awardable under this section being in addition to the original sentence, the Courts, when passing a sentence, must comply with the directions of s. 396 (2), (3), of the Code of Criminal Procedure[2].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, [intentionally offered resistance (*or* illegal obstruction) to your lawful apprehension for the offence of— with which you were charged (*or* of which you had been convicted)] (*or*) [escaped or attempted to escape from the custody of——in which he was lawfully detained for the offence of——] and thereby committed an offence punishable under s. 224 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Resistance or obstruction to lawful apprehension of another person.

225. Whoever intentionally offers any resistance[1] or illegal[2] obstruction to the lawful apprehension of any other person for an offence, or rescues[3] or attempts to rescue any other person from any custody in which that person is lawfully detained[4] for an offence[5], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

1 Criminal Procedure Code, s. 181.
2 *Chinna Madakudumban*, (1882) 1 Weir 203; *Dhoonda Bhooya*, (1867) 8 W. R. (Cr.) 85.

COMMENT.

This section punishes a person who—

(1) intentionally offers resistance or obstruction to the lawful apprehension of an offender, or

(2) rescues or attempts to rescue a person from a custody in which he is lawfully detained for an offence

The last section punishes the offenders themselves Section 130 deals with the rescue of a prisoner of State or War and s 186, with rescue in any other case

1. 'Intentionally offers resistance'.—The intention of the accused is an important ingredient in the offence If the apprehension is not lawful then resistance to such apprehension will not be any offence Where a police officer sent villagers to arrest certain persons suspected of theft, contrary to the Code of Criminal Procedure which confers no powers on a police officer to send persons who are not police officers to make an arrest which he could lawfully make it was held that resistance to the villagers did not constitute an offence under this section[1] A person who offers resistance or obstruction to the arrest by a private person of another person, who is escaping after the commission of a non bailable and cognizable offence but who did not commit the offence in view of the person attempting to arrest him, cannot be held to have committed an offence under this section[2]

2. 'Illegal'.—See s 43 *supra*

3. 'Rescues'.—This word is not defined in the Code Rescue is the act of forcibly freeing a person from custody against the will of those who have him in custody If the person rescued is in the custody of a private person the offender must have notice of the fact that the person rescued is in such custody[3] Rescue implies intention and the use of violence to effect the object desired[4] The act of rescue will always be accomplished by the use of a certain amount of criminal force A person, under such circumstances, cannot be convicted of both rescuing another person and using force[5] A person rescuing a prisoner arrested by a police officer as a member of an unlawful assembly[6] and a person rescuing a thief from the custody of a private person who had arrested him in the act of stealing[7], or from the custody of a *choukidar* to whom a private person had handed over the thief after arresting him[8], were held to have committed an offence under this section

4. 'Lawfully detained'.—The person from whose custody the rescue is effected must have authority to lawfully detain the person rescued Otherwise no offence is committed for effecting the rescue[9] It is not necessary that the custody from which the offender is rescued should be that of a policeman it is enough that the custody is one which is authorized by law[10], and it must be proved that the person rescued was in lawful custody at the time[11] Otherwise no offence is committed The accused rescuing a person alleged to have committed theft, who was unlawfully arrested by a private person and made over to the custody of a village *chowkidar*, not a police officer, was held to have committed no offence

1 *Tail Pyu*, (1909) 5 L. B R 21
2 *Alawal*, (1921) 4 U P L R. (L.) 21
3 Stephen, Dig, Cr L., Art 162
4 *Ghulam Ali*, (1883) P R No 19 of 1883, *Kallu*, (1922) 4 L L J 448.
5 *Kalisankar Sandyal*, (1869) 3 Beng L. R (A Cr J) 14
6 *Assan Shurreff*, (1870) 13 W R (Cr) 75.
7 *Kulli*, (1888) 11 Mad. 441
8 *Parsiddhan Singh*, (1907) 29 All 575.
9 *Bolai De*, (1907) 35 Cal 361
10 *Kulli*, (1888) 11 Mad 441, (1876) 1 Weir 199
11 *Dequmbur Aheer*, (1873) 21 W R. (Cr) 22
12 *Kalai v Kalu Chowkidar*, (1900) 27 Cal 306.

him did not constitute an offence under this section[1]. On a warrant which provided for bail a constable arrested a person without giving him intimation that bail had been allowed. He was rescued by a number of persons who assaulted the constable. It was held that as the constable arrested him without asking him whether he could give bail he was not in lawful custody and his rescue therefore did not constitute any offence[2]. The seal of the Court is essential to the validity of a warrant, and its absence makes the warrant void and an arrest made in execution of such warrant is not legal[3]. A civil warrant not addressed to a particular bailiff by name but addressed "to the bailiff of the Court" is not invalid. The rescuer of a person arrested under such warrant was held guilty of an offence under this section[4]. If the person rescuing another who is arrested under an illegal warrant uses more force than is necessary and causes unnecessary hurt to the public servant who has the custody of that person, he will be punished under s. 353[5].

If a person authorized to arrest has made an arrest and handed over the person arrested to the custody of an agent, such custody continues to be, what it originally was, a lawful custody[6].

5. **'Offence'.**—'Offence' means a thing punishable under the Code or any special or local law (s. 40). An escape from custody, when being taken before a Magistrate for the purpose of being bound over to be of good behaviour, is not punishable under this section[7]. Similarly, an escape from arrest under s. 55, Criminal Procedure Code, will not fall under this section[8].

PRACTICE.

Evidence.—Prove (1) that the person in question was detained in custody.

(2) That such detention was in respect of an offence.

(3) That such detention was lawful.

(4) That the accused rescued or attempted to rescue such person.

(5) That he did so intentionally.

There must be a clear finding as to the intention with which the accused acted[9].

Prove further that the case falls under a particular clause of the section.

Procedure.—Cognizable—Warrant—Bailable, if the case falls under the first clause, otherwise not bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class, if the case falls under the first clause; but by Court of Session, or by Magistrate, Presidency or first class, if it falls under the second; by Court of Session, if it falls under any of the remaining clauses.

Jurisdiction.—The words in the second paragraph of this section, describing the punishment for the offence with which the person apprehended is charged, should not be read disjunctively as denoting transportation for life or imprisonment for ten years in the alternative. A Second Class Magistrate has therefore no jurisdiction to try an offender under s. 225 (2), if the person to be apprehended or attempted to be rescued is liable to be apprehended for, or is charged with, an offence punishale with transportation for life, or an offence punishable with imprisonment for ten years[10].

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, intentionally offered resistance (*or* illegal obstruction) to the lawful apprehension of AB for the offence

1 *Gokul Tatwa*, (1924) 7 P. L. T. 65.
2 *Shyama Churn Majumdar*, (1911) 16 C. W. N. 549.
3 *Mohajan Sheikh*, (1914) 42 Cal. 708.
4 *Abdul Rahiman Sahib*, (1914) 15 Cr. L. J. 439.
5 *Mousi Lal*, (1918) 5 P. L. W. 226.
6 *Johri*, (1901) 23 All. 266, 268.
7 *Shasti Churn Napit*, (1882) 8 Cal. 331.
8 *Kandhaia*, (1884) 7 All. 67.
9 *Alawal*, (1921) 4 U. P. L. R. (L.) 21.
10 *Venkatasubbier*, (1890) 1 Weir 210.

of——under section——of the Indian Penal Code [*or* rescued (*or* attempted to rescue) the said AB from the custody in which the said AB was lawfully detained for the offence of——] and that you thereby committed an offence under s 225, clause——of the Indian Penal Code, and within my cognizance [*or* the cognizance of the Court of Session]

And I hereby direct that you be tried [by the said Court (*omit these words when the accused is tried by a Magistrate*)] on the said charge

Omission to apprehend, of sufferance of escape, on part of public servant in cases not otherwise provided for

225A. Whoever, being a public servant[1] legally bound[2] as such public servant to apprehend or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement shall be punished—

(*a*) if he does so intentionally, with imprisonment of either description for a term, which may extend to three years, or with fine, or with both, and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT

This section was substituted by Act X of 1886, s 24 (1), for the old s 225A which was inserted by Act XXVII of 1870, s 9 It punishes intentional or negligent omission to apprehend on the part of a public servant not coming within the purview of s 221, 222 or 223

Chapter IV (General Exceptions) and Chapter V (Abetment) of the Code apply to offences punishable under this section

1. **'Public servant'.**—See s 21, *supra*
2. **'Legally bound'.**—See s 43, *supra*

PRACTICE

Evidence.—Prove (1) that the accused is a public servant

(2) That he was legally bound to apprehend, or to keep in confinement, the person in question

(3) That he omitted to apprehend that person, or suffered him to escape from confinement

(4) That he did as above intentionally [*or* negligently (for clause (*b*)]

(5) That the offence does not fall under s 221, 222 or 223 or any other law

Procedure.—(*a*) In the case of intentional omission or sufferance—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class

(*b*) In the case of negligent omission or sufferance—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class

[1] *Rahm Ali*, (1911) P R No 20 of 1911

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being a public servant legally bound as such public servant to apprehend (*or* to keep in confinement) one AB intentionally (*or* negligently) omitted to apprehend the said AB (*or* suffered the said AB to escape from confinement) and that you thereby committed an offence punishable under s. 225A of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

225B. Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction[1] to the lawful apprehension[2] of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained[3], or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section was substituted by Act X of 1886, s. 24 (1).

Chapters IV (General Exceptions) and V (Abetment) of the Code apply to offences punishable under this section.

Object.—This section was introduced to provide for cases referred to in *Shasti Churn Napit*[1] and *Kandhaia*[2] in which it was held that a person escaping from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour not being punishable under s. 224 or 225 could not be punished, and for cases which s. 651 of the old Code of Civil Procedure was intended to meet.

1. 'Intentionally offers any resistance or illegal obstruction'.—See s. 43, *supra*, for the meaning of 'illegal'. Resistance to arrest must be intentional. A person who makes resistance not knowing that he is being, or is about to be, arrested, cannot be convicted of an offence under this section[3]. Where a warrant is issued by a civil Court for the arrest of a judgment-debtor and he resists the officer executing the warrant in making the arrest he will be guilty of an offence under this section. But if the judgment-debtor on seeing the officer runs into the house and thus avoids the arrest, it does not amount to intentional resistance or obstruction to arrest. There must be an overt act of resistance or obstruction which can justify a conviction under this section[4]. There must be some active opposition by show of force. Some thing more than mere absconding is required[5]. In order to constitute an offence under this section something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest[6].

Though absconding in order to avoid being served with a summons, notice, or order, is punishable, no provision exists for punishing absconding in order to

1 (1882) 8 Cal. 331.
2 (1884) 7 All. 67.
3 *Holmes*, (1927) 29 Cr. L. J. 286.
4 *Gajadhar*, (1910) 7 A. L. J. 1174.
5 *Annawdin*, (1923) 1 Ran. 218.
6 *Aijaz Husain*, (1916) 38 All. 506; *Dewa Singh*, (1918) P. R. No. 33 of 1918.

avoid arrest under a warrant The law provides certain alternative coercive procedure against the property of the absconder in such a case[1]

2. inder which a person is to be apprehen illegal, then resistance to the executior iere therefore, a warrant was issued for the arrest of a witness in the first instance without previously serving summons upon him for attendance and without recording reasons for the issue of the warrant and the witness was arrested it was held that the resistance to the execution of such a warrant was not an offence[2] If the arrest is not lawful then no offence under this section is committed[3] When the imposition of tax for the non payment of which a warrant is issued is itself illegal and *ultra vires* the resistance to its execution is not punishable under this section[4]

Obstruction to the apprehension of a person who cannot be lawfully arrested, cannot be an offence under this section e g a child under seven years[5] or searching and taking a person into custody from a place different from that specified in the search warrant[6]

T resistance or illegal obstruction to lawf seeing a process server accom panied int to arrest him in execution of a decree ran into his house and would not come out when called upon to do so, it was held that this did not amount to resistance or obstruction within the meaning of this section[8]

Resistance to an improper warrant is justifiable—It is illegal to convict a person under this section and s 353 when the warrant attempted to be executed was addressed to the person with a wrong description to which the accused did not answer[9], or when it was executed by an incompetent person[10], or when it did not contain the name of the person to be apprehended[11], or when it was void as it did not bear the seal of the Court issuing it[12] Similarly, it is illegal to cor under a defective sea warrant of arrest in ailiff of the Court, is required by Form No 154, Schedule IV, of the old Code of Civil Procedure is not a lawful arrest, and therefore resistance to the execution of such a warrant and the escape from custody of the person arrested under it is not an offence under this section[14]

If a warrant is not signed by the Judge of the Court purporting to issue the warrant, it is necessary that it should be shown either on the face of the signature itself or by evidence that the officer by whom the warrant purported to be signed had been appointed in that behalf[15]

Resistance to an arrest without notifying the substance of a warrant is justifiable — An arrest by a police-officer, without notifying the substance of the warrant

1 *Irrawadi* (1923) 1 Ran 218

2 *Sukheswar Phulan* (1911) 38 Cal 789 Where on a search warrant the name and designation of a police-officer who was to execute the warrant was omitted and he apprehended the person to be produced before the Court in accordance with the warrant but was resisted by the accused who caused hurt,

Chepa Malton (1928) 30 Cr L J 1..

7 *Nanjan* (1888) 1 Weir 205

8 *Gun Pal* and *Me Ya* (1906) U B R (P C) (1904 06) 29

9 *Debi Singh*, (1901) 28 Cal 399

10 *Durga Charan Jemadar*, (1900) 27 Cal 457, *Ghasita Mal*, (1920) 3 L L J 340

11 *Jogendra Nath Laskar* v *Hiralal Chandra Poddar*, (1924) 51 Cal 902

12 *Dasondhi* (1927) 29 Cr L J 265.

13 *Gaman*, (1913) P R No 16 of 1913, P W R (Cr) No 20 of 1913

14 *Muhammad Bakhsh* (1904) P R No 16 f 1904

15 *Mir Sarwar Jan*

to the person against whom the warrant is issued as required by s. 80, Criminal Procedure Code, is not a lawful arrest, and resistance to such an arrest is no offence under this section[1]. Where a person is arrested without a summons or a warrant having been issued, the arrest is unauthorized and such person commits no offence in escaping from custody[2].

3. 'Escapes from any custody in which he is lawfully detained'.—A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escape[3]. A peon who arrested the accused under a civil warrant made him sleep by his side in a house after nightfall. The accused escaped while the peon was asleep. It was held that the accused was liable under this section as the fact that the peon went to sleep did not in any way put an end to his custody, or affect the accused's duty to submit to the judgment of the law[4]. The accused, who was arrested by a process-server, was released by a number of his friends. He made no resistance himself but disappeared and surrendered the next morning. It was held that he having taken advantage of his release and gone away when rescued by his friends, was guilty of escaping from lawful custody[5].

The word 'escape' includes an escape effected with the consent of the custodian. Where the accused, under arrest by a process-server in execution of a decree, was set at liberty on his promise to pay the decretal amount within a given time or, failing which, to surrender himself into custody again, and subsequently failed to carry out either of the two alternatives, it was held that he had committed an offence under this section[6]. A person who escapes from the jail in which he is confined for having failed to furnish security to be of good behaviour (s. 123, Criminal Procedure Code) commits an offence under this section and not under s. 224[7].

'Lawfully detained'.—A person cannot be convicted of escape or attempt to escape, unless the custody in which he was detained was lawful[8]. A person about to be arrested is entitled to know under what power the constable is arresting him and, if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one. The prosecution must first establish that the constable who arrested the man had power to act under the specific authority that he claimed to have[9]. A warrant issued by a revenue officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal and a conviction, under this section, of the witness arrested under such warrant for escaping from custody, and of others, under this section for assaulting a public servant in the discharge of his duty, is bad in law[10]. The Allahabad High Court has taken a different view on similar facts. Two constables in the bona fide execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued. Whereupon certain persons came up and rescued the prisoners and tore up the warrant but did not cause hurt to any one. It was held that the rescuers were not liable to punishment under this section or s. 323, but should have been convicted under s. 352[11]. A civil Court is not empowered to leave a judgment-debtor in the custody of a peon

[1] *Satish Chandra Rai* v. *Jodu Nandan Singh*, (1899) 26 Cal. 748; *Abdul Gafur*, (1896) 23 Cal. 896.

[2] *Kala*, (1924) I Lah. C. 51.

[3] *Ramaswami Konan*, (1908) 31 Mad. 271; *Jamna Das*, (1927) 9 Lah. 214.

[4] *Ibid.*

[5] *D. M. Attiya*, (1922) 11 L. B. R. 449.

[6] *Senimalai Goundan*, [1919] M. W. N. 695, 25 M. L. T. 290.

[7] *Muli*, (1920) 43 All. 185.

[8] *Ramara*, (1907) 4 L. B. R. 103; *Khanu Kori*, (1923) 25 Cr. L. J. 462, 18 S. L. R. 301. See s. 225 sup, for other cases on the point.

[9] *Appasami Mudaliar*, (1924) 47 Mad. 442.

[10] *Jogendra Nath Laskar* v. *Hiralal Chandra Poddar*, (1924) 51 Cal. 902.

[11] *Gokal*, (1922) 45 All. 142.

after giving him time to pay up a decretal amount nor is such detention 'lawful custody' within the meaning of this section A judgment debtor was arrested in execution of a decree and was brought before the Court passing the decree He applied for two days time The Court made him over to the custody of a peon and the judgment debtor paid his own diet money for two days Subsequently he escaped from the custody of the peon It was held that he was not guilty of any offence as he was not in lawful custody[1] Where the accused was arrested in the verandah of his house after sunset in pursuance of a warrant for a civil Court decree and he escaped from arrest it was held that the arrest was illegal as the verandah was part of a dwelling under s 55 Civil Procedure Code and the accused could not be arrested after sunset in a dwelling house[2] Arrest under a civil process is not effected unless either the person to be arrested submits to the arrest or the officer making the arrest actually touches or confines the body of the person to be arrested Where, therefore the bailiff of a civil Court met the accused in a street, showed him his staff and told him that he was under arrest but did not touch him and the accused instead of accompanying him walked away and entered a shop, it was held that the accused could not be convicted of the offence of escaping from lawful custody of the bailiff under this section[3] A surety who had given security under O XXXVIII, s 1, Civil Procedure Code applied to the Court [illegible] rrest and de[illegible] The judgm[illegible] It was held that he was not guilty inasmuch as there was no order to find fresh security as required by the Civil Procedure Code, and the detention in the absence of such an order was illegal[4]

Bailiff must show the warrant to the person arrested —To make an arrest under a warrant issued in execution of a civil Court decree valid it may not be necessary to show the warrant to the person to be arrested, but it is the duty of the bailiff to acquaint the person with the contents of the warrant at the time he arrests him and that he was authorized to arrest him, and if the accused wants to see the warrant it would be the duty of the bailiff to show it to him If a warrant is not shown to the person arrested nor are the contents of the warrant notified to him, before or at the time of arrest, there is no lawful arrest[5]

Detention under s. 54 of the Criminal Procedure Code.—A police officer is empowered under s 54 (1) (6) to arrest without a warrant a person reasonably suspected of being a deserter from the Army Persons rescuing such a pers[illegible] from such custody are guilty under this section[6]

Village Chowkidari Act (Beng Act VI of 1890) —Resistance [illegible] arrest by a *chowkidar* is an offence[7]

Land Revenue Act (U. P. Act III of 1901), ss. 142, 143 and 146 —Under s 142 Land Revenue Act, all the proprietors are jointly and severally re[illegible] to Government for the revenue and the arrears may be realized, under [illegible] the arrest and detention of the defaulter as defined [illegible] Hence [illegible] sharer had made default in payment of Government [illegible] and [illegible] detention was confined in the lock up wherefrom he escaped it wa[illegible] was guilty of an offence under this section[8]

1 *Ma tho Singh*, (1925) 47 All 409
2 Cr Rev Case No 47 of 1925, 49 M L J 398
3 *Hudomal*, (1915) 5 S L R 141
4 *Gopal Singh*, (1928) 30 Cr L J 662
5 *Rajani Kanto Lal* (1901) 5 C W N [illegible] *Superintendent and Remembrancer of Legal Affairs* v *Baroda Kanta Majumdar*, [illegible]

[illegible]

PRACTICE.

Evidence.—Prove (1) that the accused offered some resistance or illegal obstruction.

(2) That he did so (*a*) to prevent the lawful apprehension of himself or of any other person, or (*b*) to escape or attempt to escape from any custody in which he is lawfully detained, or (*c*) to rescue or attempt to rescue some person from some custody in which that person was lawfully detained.

(3) That he did as in (1) intentionally.

Procedure.—*Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.*

The correct procedure to be adopted by a civil Court desirous of prosecuting a person who has escaped from the lawful custody of a servant of the Court is that the servants of the Court should file a complaint in the ordinary way. The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction, on a prosecution for an alleged offence under this section, irregularly instituted on a report sent in by a Munsif which was treated as a complaint[1].

Unlawful return from transportation.

226. Whoever, having been lawfully transported[1], returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

COMMENT.

This section punishes the criminal who is lawfully transported but who unlawfully returns from the place of transportation.

1. **'Having been lawfully transported'.**—A person serving out his sentence of transportation in the jail without being transported is not a person 'lawfully transported'. It is essential that the convict should have been actually sent to a penal settlement, and have returned before his term of transportation had expired or being remitted. If a prisoner escapes from custody whilst on his way to undergo sentence of transportation, he committs an offence punishable under s. 224, and not under this section[2].

The word 'lawfully' indicates that the Court passing the sentence must have jurisdiction to do so, and the offence must be one for which transportation is a legal punishment.

A prisoner was indicted for being found at large in England before the expiration of a term for which he had been sentenced to be transported. It was held that the fact of such sentence being in force at the time he was so found at large was sufficiently proved by the certificate of his conviction and sentence, the judgment remaining unreversed, although, on the face of such certificate, it appeared that the sentence was one which could not have been inflicted on him for the offence of which he had been convicted[3].

PRACTICE.

Evidence.—Prove (1) that the accused had been lawfully transported.

(2) That the term of transportation had not expired.

1 *Madho Singh*, (1925) 23 A. L. J. 189.

2 *Ramasamy*, (1868) 4 M. H. C. 152.

3 *Finney*, (1849) 2 C. & K. 774.

(3) That the punishment of such transportation had not been remitted
(4) That the accused had returned from such transportation

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge —I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at—— having been sentenced to transportation by the Court of Session of——(*specify the term*) and that on the——day of—— at——, you did return from such transportation the term of such transportation not having expired and your punishment not having been remitted and that you thereby committed an offence punishable under s 226 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Violation of condition of remission of punishment

227 Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered

COMMENT

This section deals with those cases in which remission of punishment is made conditional by Government under s 401 of the Code of Criminal Procedure

PRACTICE

Evidence —Prove (1) the nature and extent of the original punishment to which the accused had been sentenced

(2) That such punishment had been remitted

(3) That such remission had been granted to and accepted by the accused upon a certain condition

(4) That the accused violated such condition

(5) That he did so knowing that he was violating such condition

(6) Prove also whether the accused has already suffered any part of the original punishment

The first three points must be proved by documentary evidence, viz a certified copy of the judgment as regards conviction and sentence, a certified copy of the order of remission, and the bond executed by the accused Oral evidence is inadmissible on these points The identity of the accused and the breach of the conditions may be established by oral evidence[1].

Procedure —Not cognizable—Summons—Not bailable—Not compoundable —Triable by the Court by which the original offence was triable

Jurisdiction —A person convicted by the Recorder's Court of Prince of Wales Island, Singapore and Malacca, of the crime of burglary, and sentenced to transportation for ten years was released from the Ratnagiri Jail on a ticket of leave after having been in confinement for more than eight years At Karwar he committed theft in a dwelling house before his sentence had expired It was held that the First Class Magistrate at Karwar had jurisdiction to try the case[2]

1 *Nga Po Noue*, (1929) — Ran 3— 2 *Khone Hong* (1872) 9 B. H. C —

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——were sentenced in case No.—— of ——by the Court of——to——(*mention the punishment*) and which punishment was remitted on——by the order of——on your accepting the condition, to wit— and which you accepted, and which you knowingly violated in that on or about the——day of——you——(*state the nature of the violation*) and that you thereby committed an offence punishable under s. 227 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court] on the said charge.

Intentional insult or interruption to public servant sitting in judicial proceeding.

228. Whoever, intentionally[1] offers any insult, or causes any interruption to any public servant[2], while such public servant is sitting in any stage of a judicial proceeding[3], shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The object of this section is to punish a person who intentionally insults in any way the Court administering justice. It is to preserve the prestige and dignity of the Court that this section is provided. It lays down the highest sentence that could be inflicted for contempt of Court. Under s. 480 of the Criminal Procedure Code a person guilty of contempt of Court may be dealt with summarily, but in such cases he can only be fined.

Acts such as rude and contumacious behaviour; obstinacy, perverseness, prevarication or refusal to answer any lawful question; breach of the peace or any wilful disturbance whatever, will amount to a contempt of Court. The Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in Chapter XXI 'of Defamation', nor elsewhere, does it provide for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties[1].

In cases coming under this section, the Court is both prosecutor and judge and so the powers should be used only in exceptional cases. Courts taking action under this section ought not to give room for the impression that they are unduly sensitive[2].

This section is confined to those cases of contempt of Court where the public servant is sitting in any stage of a judicial proceeding. But the Court has inherent jurisdiction to punish cases of contempt not coming within the purview of this section. A process-server was insulted in most filthy language, caught by his throat and severely pushed out of the room by the plaintiff while effecting service of a notice; service was subsequently effected by him by affixing a copy on the outer door. It was held that when a process-server, in execution of his duty, has been abused and assaulted, it is a contempt of Court, as it is an attempt to obstruct or unduly interfere with the administration of justice. Those who have duties to discharge pursuant to the orders of a Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders[3].

1 *Surendra Nath Banerjee,* (1883) 10 Cal. 109, 129, 130, P.C.
2 *Ramasami Goundan,* (1915) 29 M. L. J. 274.
3 *Skone* v. *Bason,* (1925) 29 C. W. N. 766, 41 C. L. J. 515.

Ingredients —Three things are necessary under this section—

1 Intention
2 Insult or interruption to a public servant
3 The public servant insulted or interrupted must have been sitting in any stage of a judicial proceeding

1 **'Intentionally'** —The insult or interruption to the Court should be intentional "Merely uttering of words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner during the course of a judicial proceeding against him [1] An audible remark which has the effect of interrupting the Court is not enough to convict the accused[2]

As regards interruptions on the part of pleaders it has been said Some latitude should be allowed to a member of the bar, insisting in the conduct of his case upon his question being taken down or his objections noted where the Court thinks the question inadmissible or the objection untenable There ought to be a spirit of give and take between the Bench and the Bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial unless the pleader s conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court '[3]

2. **'Offers any insult, or causes any interruption to any publicl servant'** —The insult should be of a public servant sitting in any stage of a judicial proceeding A coarse expression used by a litigant but not addressed to the Court can hardly be treated as an intentional insult to the Court or interruption of the proceedings under this section, even if it is actually overheard by the presiding officer[4] No offence is committed if there is no insult or interruption[5]

Refusal to answer a question —Prevarication by a witness and refusal to answer a question might amount to intentional interruption within the meaning of this section[6] The head notes to these cases seem inaccurate All that the decisions show is that the findings of a Magistrate did not clearly specify that there had been an interruption In other words, it was held, not that prevarication could not constitute an interruption, but that it was not necessarily so[7]

Where in an inquiry ordered by the former Chief Court of the Punjab the examination of a person as a witness was adjourned to another date and on that day he, before entering into the witness box, presented to the Court an application praying that, for the reasons mentioned therein, the inquiry might be stopped and after his application was rejected he refused to answer the questions put to him by counsel in the case on the ground that his application ought to have been granted, it was held that the persistent refusal to answer any question whatsoever amounted to an intentional interruption within the meaning of this section[8]

3. **'While such public servant is sitting in any stage of a judicial proceeding'.**—Insult or interruption to a public servant, offered under this section, should be while he is sitting in a stage of a judicial proceeding A judicial proceeding is not necessarily at an end when the sentence is passed The section does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting[9] The whole sitting of a Court for the disposal of judicial work from the opening to the rising of the Court is a judicial

1 Per Mitra, J in *Surendra Nath Banerjea*, (1906) 10 C W N 1062, 1065

2 *Ramasami Goundan*, (1915) 29 M. L. J 274

3 Per Chandavarkar and Batty, JJ in *Dattatraya Venkatesh Belvi*, (1904) 6 Bom L. R 541 543

4 *Jit Singh*, (1912) P W R (Cr) No 23 of 1912

5 *Manghat Ram*, (1919) 20 Cr L. J 777

6 *Jaimal Shravan*, (1873) 10 B H C. 69 See *Auba bin Bhirav*, (1867) 4 B H. C. (Cr C.) 6 and *Pandu bin Vithoji*, (1867) 4 B H. C. (Cr C.) 7

7 *Jaimal Shravan*, sup *Devji Asa* (1889) Unrep Cr C. 473, Cr R. No 31 of 1889

8 *Gopi Chand* (1917) P R. No 14 of 1918

9 *Surendra Nath Banerjee*, (1883) 10 Cal. 109, P C.

proceeding, and the necessary interval between the conclusion of one case and the opening of another is a stage in a judicial proceeding. In proceedings against the accused under s. 107, Criminal Procedure Code, the Magistrate recorded and read out an order calling upon him to give security, whereupon the accused used certain words to the effect that the Court had to act with *zulm* (oppression) and mockingly asked whether this *zulm* was to be applied to Mahomedans as well as to Hindus. The Magistrate convicted him under this section. On appeal, the Sessions Judge set aside the conviction on the ground that proceedings under s. 107 having been concluded by the reading out of the final order, the Court had not been insulted during any stage of a judicial proceeding. The former Chief Court of the Punjab reversed the order of the Sessions Judge holding that the announcement of the order under s. 107 was undoubtedly a stage in a judicial proceeding, and these proceedings must be held to have continued until the accused was allowed to leave the Court after executing the bond required by the Court, or was removed in custody on failing to execute it. A Magistrate cannot be considered to have concluded a case the very moment he has announced his order, while his judgment is still in his hands and before he could possibly have turned to any other occupation[1].

'Judicial proceeding'.—See Comment on s. 192 as to the meaning of this expression. This expression includes any proceedings under the Registration Act, XVI of 1908. A Sub-Registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of this section[2]. So are proceedings before an Income Tax Officer pursuant to a notice under s. 23 (3)[3].

While a Tahsildar was engaged in hearing a civil case, he allowed the proceedings to be interrupted by the accused who had brought part of a sum due from him for revenue, and promised the balance on a later date. On the Tahsildar pressing for immediate payment in full, the accused was alleged to have abused him. It was held that the Tahsildar was not sitting in any stage of a judicial proceeding and therefore the accused could not be convicted under this section[4].

Contempt.—A person bidding for an estate at a sale in execution with the knowledge that he was not in a position to deposit the earnest-money[5]; a person persisting in putting irrelevant and vexatious questions to a witness after warning[6]; an accused person making an impertinent threat to a witness in the box[7]; a person sentenced to two hours' imprisonment and ordered to be kept in custody insulting the Judge in the grossest manner[8]; a person chewing betel while being examined as a witness[9]; and an accused calling the trial Judge a "prejudiced Judge"[10], were held guilty of contempt of Court.

No contempt.—A person retracting statements in giving evidence[11]; a person leaving the Court when ordered to remain[12]; or making signs from outside to a prisoner on his trial[13]; a person listening to evidence after being told to leave the Court[14]; a person absenting himself from the Court in disobedience to a summons[15]; a person using vulgar language for the purpose of emphasis[16]; a person walking out of the Court without answering the question whether he had any

1 *Salig Ram*, (1897) P. R. No. 16 of 1897; (1868) 1 Weir 214.
2 *Sardhari Lal*, (1874) 13 Beng. L. R. App. 40.
3 *Lal Mohan Poddar*, (1927) 55 Cal. 423.
4 *Sulaiman Khan*, (1881) P. R. No. 40 of 1881.
5 *Mohesh Chunder Mookerjee*, (1864) W. R. (Gap. No.) Mis. 3.
6 *Azeegoola*, (1867) P. R. No. 44 of 1867.
7 *Allu*, (1922) 45 All. 272.
8 *Venkatasami*, (1891) 15 Mad. 131.
9 *Bhavani Mudaliyar*, (1883) 1 Weir 217.
10 *Venkatrao Rajerao Mudvedkar*, (1922) 24 Bom. L. R. 386, 6 Bom. Cr. C. 186 (per Macleod, C. J., and Pratt, J., Shah, J., *dissentiente*).
11 (1861) 1 Weir 214.
12 (1870) 1 Weir 215.
13 (1870) 1 Weir 214.
14 *Papa Naiken*, (1882) 1 Weir 217.
15 (1878) 1 Weir 215.
16 (1880) 1 Weir 216.

witness[1], a person reluctantly speaking the truth, or giving inconsistent answers[2], a person walking with creaking shoes near the Court room[3], and a person presenting an application for transfer of a case containing allegations to the effect that the persons who caused the proceeding to be instituted were on terms of intimacy with the Magistrate[4], were held to have committed no offence under this section Where an accused person in making an application for transfer of the case pending against him inserted in the application assertions of a scandalous or defamatory nature concerning the Magistrate who was trying the case, it was held that there being no intention on the part of the accused to insult the Court, but merely to procure a transfer of his case, he could not be convicted of this offence[5] The use of objectionable or defamatory expressions in the petition presented to a Magistrate could not be regarded as a contempt committed in his presence justifying him in taking immediate action under this section and s 480, Criminal Procedure Code[6]

Statutory application —See s 37 of the Indian Income tax Act (XI of 1922), s 11 of the Indian Naturalization Act (VII of 1926), s 9 of the Trade Disputes Act (VII of 1929)

PRACTICE

Evidence.—Prove (1) that the person offended is a public servant

(2) That, at the time of the offence, such public servant was sitting in

used offered an insult to such

Intention must be strictly made out by the prosecution[8].

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code See s 480 Criminal Procedure Code

The law requires that a criminal Court inflicting a fine for contempt of Court should specially record its reasons, the facts constituting the contempt with any statement the offender may make as well as the finding and sentence[9] The record must show the nature and stage of the judicial proceedings in which the Court interrupted or insulted was sitting and the nature of the interruption or insult[10]

Proper opportunity should be given to the accused to meet the charge[11]

The procedure laid down in s 480, Criminal Procedure Code, should be strictly followed The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed[12]

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required[13]

1 *Abdul Rahiman* (1859) 1 Weir 218

2 *Choti Hurry Pramanaick Tantee*, (1871) 15 W R (Cr) 5

3 *Darulari Veerayya*, (1909) 5 M. L. T 256.

4 *Murli Dhar*, (1916) 38 All 284

5 *Abdullah Khan*, (1898) 18 A W N 145

6 *Wahid Bakhsh*, (1903) P L. R No 137 of 1903

7 *Prokash Chunder Dass* (1869) 12 W R (Cr) 64, *Khushal Singh*, (1886) P R. No 36 of 1866

8 (1881) 1 Weir 216 *Hurri Kishen Doss*, (1871) 15 W R (Cr) 62, *K. Chappu Menon*, (1868) 4 M H C 146, *Venkatrao Rajerao Mudiedlar*, (1922) 24 Bom L. R 386 6 Bom Cr C. 186 46 Bom 973

9 *Panchanada Tambiran*, (1869) 4 M H. C 229, *Kashinath Vithal v Daji Govind*, (1870) 27 B H. C (A C J) 102

10 *Khushal Singh*, sup, *Jathu Mal*, (1927) 29 P L. R. 663

Personation of a juror or assessor.

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned[1], empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law[2] to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily[3] serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to punish false personation of a juror or an assessor. It deals with two classes of cases: (1) where the accused had guilty knowledge before he was returned, i.e., got himself enlisted as a juror or assessor, and (2) where he had such knowledge after he was returned.

Five sections of the Code deal with false personation, viz., ss. 140, 170, 171, 205 and 229.

1. **'By personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned'.**—'To be returned' means getting oneself enlisted as a juror or as an assessor.

It is a misdemeanour at common law for a person to pretend to be a qualified juryman, and to go into the jury-box and act in the name of a qualified juryman, and this without any corrupt motive on the part of such person[1].

2. **'Not entitled by law'.**—See s. 278, Criminal Procedure Code, which says what persons are not qualified to serve as jurors or assessors. As to choosing of a jury, see s. 276, Criminal Procedure Code; as to choosing of assessors, see s. 321, Criminal Procedure Code.

3. **'Voluntarily'.**—See s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) *that the accused was returned, etc.*

(2) That he was not entitled by law to be so returned or empanelled, etc.

(3) That he caused or suffered himself intentionally or knowingly to be so returned, empanelled, etc., by personation, or otherwise.

(4) That he at the time he was so returned or empanelled, etc., knew that he was not entitled to be so returned or empanelled, etc.

Or prove points (1) and (2) as above and further—

(3) That the accused knew that he had been returned or empanelled, etc., contrary to law.

(4) That he nevertheless voluntarily served in that capacity.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of—, at——, intentionally caused (*or* knowingly suffered) yourself to be returned (*or* empanelled *or* sworn) as a juryman (*or* assessor) in case No.——of——tried by——by personating AB when you knew that you were not entitled to be so returned (*or* empanelled *or* sworn) [*or* you knowing yourself to have been so returned (*or* empanelled *or* sworn) contrary to law voluntarily served on such jury (*or* as such assessor)] and that you thereby committed an offence punishable under s. 229 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] *Clark*, (1918) 26 Cox 138.

CHAPTER XII

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

ON second conviction of an offence under this Chapter punishable with imprisonment for three years, the offender may be punished with transportation for life or ten years' imprisonment (*vide* s 75)

230 Coin[1] is metal used for the time being[2] as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used

Coin defined

Queen's coin[3] is metal stamped and issued by the authority of the Queen, or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money, and metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

Queen s coin

ILLUSTRATIONS

(*a*) Cowries are not coin

(*b*) Lumps of unstamped copper, though used as money are not coin

(*c*) Medals are not coin, inasmuch as they are not intended to be used as money

(*d*) The coin denominated as the Company s rupee is the Queen s coin

(*e*) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is Queen s coin although it is no longer so used

COMMENT

Why heavier punishment for counterfeiting the King's coin —The
nment of India should
severely the counter
n It appears to us peculiarly advisable, under the present circumstances of India, to make this distinction It is much to be wished that the Company's currency may supersede the numerous coinages which are issued from a crowd of mints in the dominions of the petty Princes of India It has appeared to us that this object may be in some
ied it That coinage, the purity of
s is likely to be the most pure, and
re will be the most readily taken in

will employ himself
in [illegible] mprobable an event
occ [illegible] rotection which is
giv [illegible] , however, that the
offi [illegible] y be called by the
technical name of treason, is in substance an offence against [illegible]
that it is an offence of very nearly the same kind with the for
and that it would be an offence of exactly the same kind

the notes of the Bank of England formerly, were in all cases legal tender, or if the coin, like the Company's gold mohur at present were not legal tender. We do not therefore conceive that in proposing a law for punishing the counterfeiting of the King's coin, we are proposing a law which can reasonably be said to affect any of the royal prerogatives"[1].

1. 'Coin'.—The present definition of 'coin' was introduced by Act XIX of 1872 in order to check the practice of counterfeiting the copper coin of Native States. The former definition defined coin as "metal stamped and issued by the authority of some Government". But 'Government', by s. 17, denotes the person or persons authorized by law to administer executive Government in any part of British India. It had thus happened that the coin of Native States was not coin within the meaning of the Code.

2. 'For the time being'.—These words were introduced by Act XIX of 1872 as it was suggested that the definition might possibly be held to include old coin, such as a Græco-Bactrian Stater formerly used as money, but now regarded only as a curiosity. A coin of the time of Emperor Akbar[2] or a gold mohur of the reign of Shahjahan[3] cannot be deemed to be a coin inasmuch as it is not used for the time being as money.

Legal tender not necessary.—Coin need not be a legal tender receivable at a value in rupees fixed by law. Gold mohurs which although they do not pass at an absolutely fixed value, yet have a current value, not ascertainable merely by weighing them as lumps of gold, but attaching to them as coin, are coins "for the time being used as money"[4].

The test of whether a particular piece of metal is money or not (supposing it genuine) is the possibility of taking it into the market, and obtaining goods of any kind in exchange for it. For this, its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient[5].

3. 'Queen's coin'.—The present definition of Queen's coin was introduced by Act VI of 1896, s. 1. The reasons for amending the definition are stated as follows: "At present 'coin' is defined as metal used for the time being as money, and the consequence is that, if any offence under these sections has to be proved, it has to be shown that the coin was in use at the time of the offence as money. There is a process in coinage which is provided for by law, namely, in the Indian Coinage Act, which is termed 'the calling in of coin'. This gives Government an authority which it exercises under certain circumstances to call in coin and to cause it after a certain time to cease to be used as money. It is extremely doubtful whether, if the coin so called in has been counterfeited, a Court would hold that it was in use as money after the date of the proclamation which had called it in. After a certain time it would certainly cease to be in use as money. This power to call in money has been exercised in one case,—and I think in only one,—namely, that of the Farukhabad rupee, which immediately preceded the existing Government rupee, or, as it was at first called, 'the Company's rupee'. It was called in in 1877. We have ascertained that this coin has been recently largely manufactured in Bombay. The manufacture has been carried on perfectly openly, and it has been brought to our notice by some of our Political Officers, who showed that it was being imported into Central India and Rajputana in considerable quantities. This manufacture we are unable, under the present law, to stop, because that particular coin is not in use at present as money. The immediate practical object of the change which I propose to the Council to make in the Indian Penal Code is to put a stop to this particular coinage. But it is obvious that the same necessity

1 Note I, pp. 134, 135.
2 *Bapu Yadav*, (1874) 11 B. H. C. 172.
3 *Khushali*, (1906) 29 All. 141.
4 *Kunj Beharee*, (1873) 5 N. W. P. 187.
5 *Bapu Yadav*, sup.

may arise in any future case We may at any time find reason to call in any particular issues of the rupee, and it would be an extremely peculiar state of the law if an act which is to day reckoned so harmful as to be punishable with ten years imprisonment should to morrow become a perfectly innocent one It is to protect our action against a consequence of this kind that the measure is proposed

"But there is a special necessity peculiar to India which arises in this connection In a great part of the Native States of India coin is not current in the same legal sense in which it is current in British India, that is to say, there is no law of legal tender, and the consequence is that many kinds of coins pass in those Native States from hand to hand not by reason of being legal tender, but by reason of each person who receives them knowing that they are customarily current in his own or other Native States, and that any other person will receive them in the same way as he receives them From the fact that these Farukhabad rupees were imported in such large quantities into Rajputana and Central India, there can be little doubt that they are current in this sense in certain parts of Rajputana and Central India It seems to me, therefore that we are under some obligation to the Native States in this matter not to permit a coin which passes, or which certainly might pass there from hand to hand as an ordinary circulating coin, to be fabricated by private individuals in British India [1]

Illustration (e)—This illustration was added by Act V of 1896 s 1 (2)

It has been held that Murshidabad rupees stand on the same footing as Farukhabad rupees[2]

Statutory application—See the Bronze Coin (Legal Tender) Act, 1918, s 2 (2)

Counterfeiting coin

231. Whoever *counterfeits*[1], or *knowingly performs* any part of the process[2] of counterfeiting, coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Explanation—A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin

COMMENT

It is not necessary under this section that the counterfeit coin should be made with the primary intention of its being passed as genuine it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such[3]

1. 'Counterfeit'.—A counterfeit coin means a coin not genuine, but resembling or apparently intended to resemble or pass for, genuine coin and includes genuine coin prepared or altered so as to resemble or pass for coin of a high

[1] Gazette of India, 1895 Part VI, p 340
[2] *Dens* (1905) 28 All 62, *Gopal* (1903) 23 A W. N 115, *Baran*, (1902) P R No 1 of 1903.
[3] *Qadir Bakhsh*, (1907) 30 All 93 *Amrit Sonar* (1919) 4 P L. J 523.
[4] Stephen's Dig of Cr L., Art. 405
[5] (1863) 1 Weir 219
[6] 1 East P C, c. 4, s. 13, p 164.

impression of any sort on a counterfeit coin if it was meant to pass off as a worn out or defaced coin of a particular denomination[1]. Preparing blanks with such material as when rubbed will make them resemble the real coin amounts to a complete offence[2]. It is not also necessary that the counterfeit coin should be counterfeit of the current coin[3].

2. **'Performs any part of the process'.**—The offence is complete although the coin may not be in a fit state to be uttered, or the work may not be finished or perfected. The section applies equally whether the act of counterfeiting is complete or unfinished.

Coin should be of a kind for the time being used as money.—Where a person counterfeited a coin of the Emperor Akbar's time, it was held that he committed no offence under this section[4]. A person counterfeiting Kuldar and Jeypur gold-mohurs was held to be guilty under this section because although they did not pass at a fixed value yet had a current value attached to them as coin[5]. Certain Nepalese came to the shop of the accused who at their request agreed to make for them in German silver a number of imitations of a current Nepalese coin. The coins were not intended originally to be passed as genuine coins, for it was stipulated that they should be made with hooks attached to them; but in fact this was not done and the coins were handed over plain. It was held that he was guilty under this section[6]. Certain merchants had been in the habit of sending copper to the Nawab of Loharoo, who turned the metal, in a mint established for the purpose, into small round pieces upon which a certain stamp was impressed, the stamp not purporting to resemble the mark on any legal coin. These pieces of copper were then sold in the bazaars in British India by weight, and used as money. It was generally believed that the Nawab had authority to establish the mints and issue this copper as coin. It was held that the pieces of copper were not counterfeit coin[7].

Where the impression of money was forged on an irregular piece of metal, not rounded, without finishing it, so as not to be in a state to pass current, the offence was held to be incomplete, although the accused had actually attempted to pass it in that condition[8]. Where a genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely and a new milling had been added in order to restore the appearance of the coin, it was held that the coin was false and counterfeit[9].

Passing a medal—A person fraudulently representing to an ignorant person a medal as being money commits no offence[10].

PRACTICE.

Evidence.—Prove (1) that the metal is a coin.

(2) That the accused counterfeited it, or performed on it any part of the process of counterfeiting.

(3) That he did so knowingly.

1 *John and Patrick Welsh,* (1785) 1 East P. C. 164, 1 Leach 364; *Samuel Wilson,* (1783) 1 Leach 285.
2 *William Case,* (1897) 1 East P. C. 176, 1 Leach 154 (*n*).
3 *Kandamulu Annappa,* (1883) 1 Weir 221.
4 *Bapu Yadav,* (1874) 11 B. H. C. 172.
5 *Kunj Beharee,* (1873) 5 N. W. P. 187.
6 *Qadir Bakhsh,* (1907) 30 All. 93.
7 *Premsookh Dass,* (1870) P. R. No. 38 of 1870.
8 *Varley,* (1771) 1 East. P. C. 164.
9 *Hermann,* (1879) 4 Q. B. D. 284.
10 (1863) 1 Weir 219. But in an English case a person who uttered a medal resembling a half-sovereign in size, figure and colour, but of less value than a half-sovereign was convicted under 24 & 25 Vic., c. 99, s. 13, because that Act made passing of medals as coin punishable: *George Robinson,* (1865) L. & C. 604.

To prove the offence of counterfeiting, it is not necessary to show that the accused person was detected in the act But presumptive evidence will be sufficient as false coin was found in the possesion, and that there were coining tools discovered in his house, etc

Where the accused is charged with 'performing any part of the process of counterfeiting' it will not be sufficient merely to show that steps have been taken towards counterfeiting as by providing materials, tools, etc , but some stage of the process itself must be proved to have been commenced

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Bombay Circular —*Evidence of a mint officer* —When the evidence of an officer connected with the mint or the Currency Department is required as to the genuineness or spuriousness of a coin or currency note, the Courts and Magistrates are recommended to send the coin or note to the Mint Master, or to the Commissioner of Paper Currency, Bombay, as the case may be, under cover of their Court seal or by messenger whose evidence can afterwards be taken and at the same time, to issue a commission for the examination of such officer as a witness under the provisions of s 503 of the Code of Criminal Procedure This will prevent the great inconvenience of officers being called away from their duties on mere ordinary occasions In special cases a careful discretion is to be exercised, regard being had to the considerations above stated[1]

Lower Burma Rule —The Government of India have drawn attention to the inadequacy of the sentences which in some instances are passed by the Court *for offences relating to the coinage Magistrates are therefore reminded of the* necessity for the imposition of suitable sentences in such cases Sessions Judges and District Magistrates are also requested to scrutinize carefully all sentences passed in such cases In any instance in which the sentence of the Court is obviously insufficient, application should be made to the Chief Court to revise and enhance the sentence[2]

Charge —I (*name and office of Magistrate etc* ,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——at—— counterfeited (*or* knowingly performed any part of the process of counterfeiting to wit——), a coin (*or* King's coin) to wit—— and that you thereby committed an offence punishable under s 231 of the Indian Penal Code, and within the cognizance of the Court of Session

And I hereby direct that you be tried by the said Court on the said charge

Counterfeiting Queen's coin

232. Whoever counterfeits[1], or knowingly performs any part of the process[2] of counterfeiting, the Queen's coin[3], shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT

commi

that the coins made will be used as King's coin or a knowledge that they are likely to be used as such Such knowledge or intention will be inferred from the mere fact of counterfeiting, except under circumstances which conclusively

[1] B H. C. Cr C. O, Ch V, s. 77, p 52 [2] L. B. C. M, Vol

negative, it; but a distinction must be drawn between a deception practised for show merely, and one practised for wrongful loss or gain, and the former is not an offence under the Penal Code[1].

1. **'Counterfeits'.**—See s. 28, *supra*.
2. **'Performs any part of the process'.**—See s. 231, *supra*.
3. **'Queen's coin'.**—See s. 230, *supra*.

Circulation of a spurious coin not necessary.—In order to constitute offences under this section and s. 235, it is not necessary to prove that the accused intended that the spurious coins should go into circulation and be used as money. It is sufficient that there should be the intention to practise deception by means of the imitation[2]. But where false coins are made only for the purpose of passing them secretly into the house of the coiner's enemy in order to get him into trouble, the persons making those coins and in possession of the instruments and materials used therefor are neither guilty under this section nor under s. 235, but are liable to be convicted only under s. 195[3].

CASES.

Quick-silvering a coin.—Where the accused had in his possession a double piece, which he quick-silvered so that it resembled a rupee, and he delivered it to a third person to get it changed for other coins as a rupee, it was held that he would not be guilty of an offence under this section, unless at the time of quick-silvering the coin he intended thereby to practise deception, or knew it to be likely that deception would thereby be practised[4]. Explanation 2 to s. 28 added by the Metal Tokens Act I of 1889 shakes the principle of this case. See *Qadir Bakhsh*[5], where such defence was held not good.

Sections 232 and 235.—Where a person removed the ring from a coin which had been used to form part of a necklace or other ornament, and worked up the face of the coin where the ring had been, it not being shown that any material part of the coin had at any time been removed, it was held that he was not guilty under this section[6].

PRACTICE.

Evidence.—Prove the same points as for s. 231, showing in (1) that the coin counterfeited is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sections 232 and 235.—The accused was convicted of, and sentenced for, an offence under s. 232, i.e., for performing a part in the process of counterfeiting King's coin, and on a second count under s. 235, for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin. It was held that the possession of such instruments and materials being part and parcel of the transaction of counterfeiting coin the sentence for the second offence was illegal[7].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did counterfeit a piece of the King-Emperor's coin, to wit——, and that you thereby committed an offence

1 *Shumsoodeen*, (1868) P. R. No. 26 of 1868.
2 *Pirbhu*, (1899) P. R. No. 4 of 1899.
3 *Lal Chand*, (1911) P. W. R. (Cr.) No. 17 of 1912, P. L. R. No. 43 of 1912.
4 *Miharban*, (1883) P. R. No. 9 of 1884.
5 (1907) 30 All. 93.
6 *Muhammad Husain*, (1901) 23 All. 420.
7 *Hayat*, (1904) P. R. No. 14 of 1904; *Bishen Das*, (1922) 5 L. L. J. 272.

punishable under s 232 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge

Making or selling instrument for counterfeiting coin

233. Whoever makes or mends, or performs any part of the process[1] of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe[2] that it is intended to be used, for the purpose of counterfeiting[3] coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

COMMENT

. . towards dies or

1. **'Performs any part of the process'.**—It is not necessary that the instrument should be capable of making an entire impression of a coin[1]

2 **'Reason to believe'.** See s 26, *supra*

3. **'Counterfeiting'.**—See s 28, *supra*

PRACTICE

Evidence.—Prove (1) that the accused made, or mended, or performed some part of the process of making or mending the die or instrument or that he bought, sold, or disposed of it

(2) That he did so, for the purpose that such die or instrument might be used for the purpose of counterfeiting coin, or that he knew, or had reason to believe that the same was intended to be used for such purpose

Procedure.—Cognizable—Warrant—Not bailable Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

In the case of a previous conviction the accused should be committed for trial to the Court of Session, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted[2]

Charge —Same as that for s 231

Making or selling instrument for counterfeiting Queen's coin

234. Whoever makes or mends, or performs any part of the process[1] of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe[2] that it is intended to be used, for the purpose of counterfeiting[3] the Queen's coin[4], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section describes the same offence as in the last, but provides enhanced punishment as the coin affected is the King's coin

[1] *Foster*, (1836) 7 C. & P 494

[2] Criminal Procedure Code, s. 348.

1. **'Performs any part of the process'.**—See s. 231, *supra*.
2. **'Reason to believe'.**—See s. 26, *supra*.
3. **'Counterfeiting'.**—See s. 28, *supra*.
4. **'Queen's coin'.**—See s. 230, *supra*.

CASES.

Intention necessary.—The accused employed a die-sinker to make for a pretended innocent purpose a die calculated to make shillings; the die-sinker, suspecting fraud, informed the Commissioners of the mint, and under their directions made the die for the purpose of detecting the accused. It was held that the die sinker was an innocent agent, and the accused was the real offender[1]. The accused ordered dies, impressed with the resemblance of the sides of a sovereign, of the maker. The maker gave information to the police, who communicated with the authorities of the mint. The latter authorities, through the police, gave the maker permission to give them to the accused. He did so, and they were found in the accused's possession. It was held that the accused being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute felony, whatever his intention as to their use might be[2].

PRACTICE.

Evidence.—Prove the same points as for s. 233, showing in (1) that the coin counterfeited is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did make (*or* mend *or* perform any part of the process of making or mending, to wit——, *or* buy, *or* sell, (*or* dispose of) a certain die (*or* instrument) for the purpose of being used) (*or* knowing, *or* having reason to believe that it was intended to be used) for counterfeiting a piece of the King-Emperor's coin, to wit—; and that you thereby committed an offence punishable under s. 234 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Possession of instrument or material for the purpose of using the same for counterfeiting coin;

235. Whoever is in possession of any instrument or material[1], for the purpose of using the same for counterfeiting[2] coin, or knowing or having reason to believe[3] that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if Queen's coin.

and if the coin to be counterfeited is the Queen's coin[4], shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[1] *Benjamin Bannen*, (1844) 2 Moody 309, 1 Car. & K. 295.

[2] *Harvey*, (1871) L. R. 1 C. C. R. 284.

COMMENT

This section punishes the person who is in possession of any instrument or material for the purpose of using the same for counterfeiting coins

1. 'Possession of any instrument or material'.—The word 'possession' connotes the intention to exercise power or control over the object possessed (*animus sibi habendi*) and therefore necessarily implies that the possessor has been conscious of the possibility of exercising that power or control The mere physical relation arising from the position of the object is insufficient The possession contemplated is not possession which has never been voluntary and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact of which he knows nothing, would be valueless The section no doubt also requires in the accused person intention or knowledge as to the use to be made of the objects in possession, and these might be implied from the nature of the objects themselves But before that stage is reached, there must be some circumstance indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word 'possession' ' Such indication may arise from the position of the object in a place which is constantly used by the person accused, and which could not be overlooked by him, or from the bulk of the object itself, or from any circumstance, such as the locking up of the object which would point to voluntary and conscious possession"[1]

Under the English statute dealing with offences relating to coin the word 'possession' embraces a wider area Having any matter in the custody or possession of any person includes "not only the having it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house, or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person"[2]

If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction, they cannot both be convicted The fact of a wife attempting to break up coining implements at the time of her husband's apprehension if done with the object of screening him, is no evidence of possession[3] Where several persons are found in a room where false coining is going on and most of them are shown to have taken active part therein, they are all to be

nd materials lying

of moulds for the purpose of using the same for making counterfeit coins and of being in possession

l after the

verandha

n that the

father was never seen in possession of the moulds or of the counterfeit coins, it was held that the ordinary presumption that the things in the house of a joint

[1] Per Batty, J, in *Hari Maniram Sonar*, (1904) 6 Bom L R 857, 891 In the same case, Aston, J, did not concur in the above remarks, and went on to say (p 894) I think that if we introduce 'conscious' or 'voluntary' before the word possession where that word is not so qualified in a section of the Indian Penal Code we shall be legislating instead of administering the law, with inconvenient consequences such as shifting the burden of proof indicated by sections 114 and 106 of the Evidence Act and even altering the substantive criminal law.

[2] 24 & 25 Vic, c 99, s. 1

[3] *Boober*, (1850) 4 Cox 272

[4] *Lal Chand*, (1911) P W R. (Cr) No 17 of 1912, P L. R. No 43 of 1912.

Hindu family were in the possession, and under the control, of the managing member, had been rebutted[1].

It is not only necessary that the accused should be in possession of the instruments or materials for counterfeiting coin, but it should also be proved that the possession was within the accused's knowledge[2].

The accused was in possession of a box containing instruments used for counterfeiting coin. It appeared that two other brothers of his had access to the box and it was not proved that there was any property of the accused in it. It was held that the accused could not be convicted for it was not shown that he was in exclusive possession of the box[3]. The accused went into a village and purchased sweetmeats from one K for which he paid a counterfeit two-anna piece: he also delivered another counterfeit two-anna piece to R in payment for some milk. K, on discovering the fraud, pursued the accused and aided by two others arrested him. On being pursued the accused threw away a yellow bag which was found to contain a mould, an instrument called a "gugui" used for keeping up a draught in a fire, a file and some white metal all evidently instruments or materials used for counterfeiting coin. It was held that he was guilty of an offence under this section[4].

Where coining instruments were found in a house occupied by a man, his wife and a child ten years of age, the jury were directed to acquit the child of a felonious possession[5]. The accused was indicted for knowingly and without lawful excuse having in his possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. The mould was found in the house of the accused, who had previously passed a bad half-crown; but there was no evidence to show that the half-crown had been made in that mould. It was held thet there was sufficient evidence to go to the jury[6].

Instruments of coining.—The following are held to be instruments of coining: a press for coinage[7]; a mould on which was impressed the resemblance of a shilling inverted[8]; a puncheon of iron upon which was impressed the figure and similitude of the head-side of a shilling[9]; a collar of iron for graining the edges of counterfeit money[10]; and a galvanic battery[11].

2. 'For the purpose of using the same for counterfeiting coin'.—The mere possession of instruments and materials capable of counterfeiting coins is no offence. Possession of such instruments should be with the intention of counterfeiting coins, and the intention must be proved in order to establish the charge. The accused had in his possession three 'dies' and some instruments for the purpose of counterfeiting coin. He was a goldsmith by occupation, and the instruments found with him were required for his work as a goldsmith. The dies were deficient and no complete counterfeit coin could be struck from them either singly or combined. There was no evidence that he ever used those instruments or dies for the purpose of counterfeiting. It was held that he was not guilty of an offence under this section[12]. Instruments and materials which can be used for the purpose of making false coins as well as other purposes are to be considered instruments and materials used for the purpose of making false coins when these rae found in connection therewith[13].

3. 'Reason to believe'.—See s. 26, *supra*.

[1] *Amrit Sonar*, (1919) 4 P. L. J. 525. See *Sangam Lal*, (1893) 15 All. 129, as to what evidence is necessary where a criminating article is found in a common room of a joint family house.
[2] *Nga San Nyein*, (1915) 8 B. L. T. 131.
[3] *Abdul Majid*, (1903) P. L. R. No. 7 of 1904.
[4] *Ahmad Shah*, (1892) P. R. No. 10 of 1892.
[5] *Boober*, (1850) 4 Cox 272.
[6] *Weeks*, (1861) L. & C. 18.
[7] *Bell*, (1753) 1 East P. C. 169.
[8] *Lennard*, (1772) 1 East P. C. 170.
[9] *Ridgeley*, (1878) 1 Leach 189.
[10] *Moore*, (1925) 2 C. & P. 235.
[11] *Gover*, ((1863) 9 Cox 282.
[12] *Khadim Hussain*, (1924) 5 Lah. 392.
[13] *Lal Chand*, (1911) P. W. R. (Cr.) No. 17 of 1912, P. L. R. No. 43 of 1912.

4 **'Queen s coin .'**—See s 230, *supra*

PRACTICE

Evidence—Prove (1) that the instrument or material in question is one for the purpose of counterfeiting coin (*or* King s coin)

It must be shown by the prosecution that the instrument is capable of counterfeiting coin[1]

(2) That the accused was in possession of such instrument or material in question

(3) That he was in possession thereof for the purpose of using it, or that he knew or had reason to believe that it was intended to be used for that purpose

Procedure—*Cognizable—Warrant—Not bailable—Not compoundable*—Triable by Court of Session if the offence relates to King s coin, otherwise by Court of Session or Magistrate Presidency or first class

In the case of a previous conviction the accused should be committed for *trial to the Court of Session*[2]

Charge—I (*name and office of Magistrate etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——at——were in possession of a *certain instrument (or material) to wit——for the purpose of using the said* instrument for counterfeiting a piece of King Emperor s coin known as——[*or* knowing or having reason to believe that the said instrument was intended to be used for the purpose of counterfeiting etc] and thereby committed an offence punishable under s 235 of the Indian Penal Code and within the cognizance of the Court of Session

And I hereby direct that you be tried by the said Court on the said charge

Sentence—Having regard to s 71 of the Code separate sentences cannot be passed under s 232 and this section

Abetting in India the counterfeiting out of India of coin

236 Whoever, being within British India[1] abets[2] the counterfeiting[3] of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India

COMMENT

Any person in India, whether a British subject or a foreigner, who supplies instruments or materials for the purpose of counterfeiting any coin or assists in any other way, is punishable under this section Abetment in British India must be complete

1. **'British India'**—See s 15 *supra*
2. **'Abets'**—See s 107, *supra*
3. **'Counterfeiting'**—See s 28, *supra*

PRACTICE

Evidence—Prove (1) that the accused abetted the counterfeiting of coin

(2) That the counterfeiting of coin was to be out of British India

(3) That the accused was in British India at the time of such abetment

Procedure—*Cognizable—Warrant—Not bailable—Not compoundable*—Triable by Court of Session

[1] *Kona Tirumala Reddi* (1880) 1 Weir 210 [2] Criminal Procedure Code, s. 348.

Charge.—I (*name and office of Magistrate etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——at——being in British India abetted one AB residing out of British India at——in the counterfeiting of coin by doing (*mention the act done*) and thereby committed an offence punishable under s. 236 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Import or export of counterfeit coin.

237. Whoever imports into British India[1], or exports therefrom, any counterfeit[2] coin, knowing or having reason to believe[3] that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this and the following section consists in an import or export, whether by sea or by land, of any coin known by the importer, or which he has reason to believe, to be counterfeit.

1. **'British India'.**—See s. 15, *supra.*
2. **'Counterfeit'.**—See s. 28, *supra.*
3. **'Reason to believe'.**—See s. 26, *supra.*

PRACTICE.

Evidence.—Prove (1) that the coins in question are counterfeit coins.

(2) That the accused imported into, or exported from, British India, such coins.

(3) That he, at the time he so imported or exported them, knew, or had reason to believe, that they were counterfeit.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—Same as for s. 238.

Import or export of counterfeits of Queen's coins.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section describes the same offence as the one under the preceding section, but provides enhanced punishment as the coin is King's coin.

PRACTICE.

Evidence.—Prove the same points as for s. 237, showing in (1) that the counterfeit coins are King's coins.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, did import into (*or* export from British India, viz at——, certain pieces of counterfeit King Emperor's coin, to wit—— (*specify the amount and name of the coins*) knowing (*or* having reason to believe) that the said coins were counterfeit and that you thereby committed an offence punishable under s 238 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Delivery of coin possessed with knowledge that it is counterfeit

239 Whoever, having any counterfeit[1] coin, which at the time when he became possessed[2] of it he knew to be counterfeit,[3] fraudulently[4] or with intent that fraud may be committed delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine

COMMENT

Object —This section is directed against a person other than the coiner, who procures or obtains or receives counterfeit coin, and not to the offence committed by the coiner[1] The receipt of the false coin, knowing at the time it is received that it is counterfeit, is made the test of a person being such a dealer The offence contemplated in this section appears to be a delivery or attempt to deliver by such a dealer to some person whether an accomplice or not the intention being that that person or some other should be defrauded

The authors of the Code says 'An utterer by profession an utterer who is

it would otherwise be He passes his life in the systematic violation of the law and in the systematic practice of fraud in one of its most pernicious forms He is one of the most mischievous and is likely to be one of the most depraved of crimina

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honest acts It is an act which proceeds not from greediness for unlawful gain but from a wish to avoid by unlawful means it is true, what to a poor man may be a severe loss It is an act which has no tendency to facilitate or encourage the operations of the coiner It is an occasional act an act which does not imply that the person who commits it is a person of lawless habits We think therefore, that the offence of a casual utterer is perhaps the least heinous of all the offences into which fraud enters

We considered whether it would be advisable to make it an offence in a person to have in his possession at one time a certain number of counterfeit coins without being able to explain satisfactorily how he came by them It did not, after much discussion, appear to us advisable to recommend this or any similar provision We entertained strong objections to the practice of making circum

1 Sheobux (1871) 3 N W P 160.

stances which are in truth only evidence of an offence part of the definition of an offence; nor do we see any reason for departing in this case from our general rule.

"Whether a person who is possessed of bad money knows the money to be bad, and whether, knowing it to be bad, he intends to put it in circulation, are questions to be decided by the tribunals according to the circumstances of the case, circumstances of which the mere number of the pieces is only one and may be one of the least important. A few bad rupees which should evidently be fresh from the stamp would be stronger evidence than a greater number of bad rupees which appeared to have been in circulation for years. A few bad rupees, all obviously coined with the same die, would be stronger evidence than a greater number obviously coined with different dies. A few bad rupees placed by themselves, and unmixed with good ones, would be far stronger evidence than a much larger number which might be detected in a large mass of treasure"[1].

Three classes of offences are created by ss. 239 to 243.

(1) Delivery to another of coin, possessed with knowledge that it is counterfeit (ss. 239, 240).

(2) Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit (s. 241).

(3) Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof (ss. 242, 243.)

1. **'Counterfeit'.**—See s. 28, *supra*. It is not necessary that the counterfeit coin should be counterfeit of a current coin[2]. But it must be a counterfeit of a coin used for the time being as money. Otherwise the offence will be that of cheating and not of uttering false coin[3].

2. **'Possessed'.**—See s. 235, *supra*.

3. **'Which, at the time when he became possessed of it, knew it to be counterfeit'.**—These words point to a person other than the coiner, that is, the person who procures, or obtains, or receives counterfeit coins[4]. Against such a person this and the following sections are directed.

All that is required is a guilty knowledge of the spuriousness of the coin at the time of receiving possession of it[5].

A knowledge of the coin being counterfeit at the time of becoming possessed of it was inferred from the fact of the accused being goldsmiths[6].

4. **'Fraudulently'.**—See s. 25, *supra*.

Uttering under this section must be with intent to defraud the party receiving the money. The giving of a piece of counterfeit money in charity is held to be not an uttering, although the person may know it to be counterfeit[7]. But this decision has been not only questioned in a later case where a person who gave a counterfeit coin to a woman with whom he had intercourse was held to be guilty of uttering[8], but it is considered to have been overruled[9].

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused became possessed of it.

(3) That when he became so possessed he knew that it was a counterfeit coin.

(4) That he delivered it to some one, or attempted to induce some one to receive it.

1 Note 1, pp. 135, 136.
2 *Kandamuru Annappa*, (1883) 1 Weir 21.
3 *Khushali*, (1906) 29 All. 141.
4 *Sheobux*, (1871) 3 N. W. P. 150.
5 *Parushullah Mundul* v. *Kheroo Mundul*, (1874) 23 W. R. (Cr.) 4; *Karuppa Muppen*, (1887) 1 Weir 222.
6 *Kandamuru Annappa*, sup.
7 *Page*, (1837) 8 C. & P. 122.
8 *Anon*, (1845) 1 Cox 250.
9 *William Ion*, (1852) 2 Den. Cr. C. 475, 484.

(5) That he, when he so delivered it, etc , intended to defraud, or intended that a fraud might be committed.

Evidence of the possession and the attempted disposal of coins of unusual

... ch previous uttering must have

... coin, in order to prove a guilty

... bsequent uttering by the accused of

Section 14, ill. (b), of the Indian Evidence Act, recognizes this principle of English cases

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Charge.—Same as that for s 240

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin possessed with knowledge that it is counterfeit

COMMENT.

The offence under this section is an aggravated form of the offence described in the last This section does not apply to the actual coiner[5] The offence under it is committed even though the coin is refused by the person to whom it is offered[6].

See Comment on s. 23, *supra*.

CASES.

Sections 240 and 243.—A person having four counterfeit rupees in his possession, but uttering only one of them, cannot be separately convicted under s 240 respecting the one rupee, and under s 243 regarding the other three, because an offence under this section implies prior guilty possession[7].

Delivering.—The accused went into the shop of D, and asked to purchase some coffee and sugar, and in payment of the same he put down on D's shop a counterfeit shilling, which D took up and said to the accused that it was a bad one The accused left D's shop, leaving the shilling, but without the coffee and sugar It was held that he was guilty of uttering a false coin[8].

[1] *Nur Mahomed*, (1883) 8 Bom 223.
[2] *Harrison*, (1834) 2 Lewin 118.
[3] *Sill*, (1892) 3 F & F 834 , *Sarah Whiley*, (1804) 2 Leach 983
[4] *Fowler*, (1853) 6 Cox 521, 21 L J (M C) 134, Dearsly 456.
[5] *Ahmad Shah*, (1892) P. R No 10 of ...
[6] *Patrick Welch*, (1851) 20 L J (M C) ...
[7] *Lakshua*, (1881) Unrep Cr C ...
[8] *Patrick Welch*, (1851) 20 L J ... See *Purusullah Mundul* (1874) 23 W. R. (Cr ...

Ringing the changes.—R bargained with the accused, a fruiterer, to hav five apricots for six pence, and gave him a good shilling to change. The accuse put the shilling into his mouth as if to bite it in order to try its goodness, and returning a shilling to R told him it was a bad one. R gave him another good shilling, which also he affected to bite, and then returned another shilling saying it was not a good one. Again R gave him a third good shilling with which he practised this trick a third time. The shillings returned by the accused were all bad shillings. It was held that he was guilty of uttering bad coin[1].

PRACTICE.

Evidence.—Prove the same points as for s. 239, showing in (1) that the counterfeit coin is a counterfeit of the King's coin.

Joint uttering.—If two accused are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two accused went into a shop, and that one of them went and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted: the uttering and the possession being both joint[2].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, having in your possession ——pieces of counterfeit King-Emperor's coin, known as——, knowing at the time when you became possessed of the said coins that they were counterfeit, fraudulently (*or* with intent that fraud might be committed) delivered the same to one AB (*or* attempted to induce AB to receive the same), and thereby committed an offence punishable under s. 240 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.

241. Whoever delivers to any other person as genuine,[1] or attempts to induce any other person to receive as genuine, any counterfeit[2] coin which he knows to be counterfeit but which he did not know to be counterfeit at the time when he took it into his possession[3], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

ILLUSTRATION.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were

1 *Franks*, (1794) 2 Leach 644.

2 *Skerrit*, (1826) 2 C. & P. 427.

good Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be

COMMENT

This section applies to a casual utterer of base coins Sections 239 deals with professional utterers A casual utterer may not be aware that the coin was counterfeit at the time when he took it into his possession but he is responsible if he utters it knowingly

1. **'As genuine'.**—The gist of an offence under this section is that a person should deliver or attempt to induce any other person to receive as genuine a coin known to be counterfeit[1] Where A handed a counterfeit coin to his friend, in order to avoid its being discovered by the police in A's possession, it was held that A committed no offence under this section because the coin was not delivered as genuine[2] If the Court be of opinion that the coin was not intended by the utterer to pass as a good coin, it should not convict the accused[3] Where a person tendered a false coin to another and asked for change which was refused on the ground that the coin was false, and he thereafter tendered it to another person, it was held that it might be presumed that after the first refusal the accused knew the coin to be bad and that his attempt thereafter to induce another person to receive it constituted an offence under this section[4]

2. **'Counterfeit'.**—See s 28 *supra*

3. **'Possession'.**—See s 235, *supra*

PRACTICE

Evidence.—Prove (1) that the coin in question is a counterfeit coin

(2) That the accused delivered it or attempted to induce some one to receive it

(3) That he so delivered it or so attempted to induce some one to receive the same, as genuine

(4) That he, at the same time he delivered it, etc , knew the same to be a counterfeit coin

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, having in your possession ——pieces of counterfeit King Emperor's coin, known as——delivered as genuine to one AB the said coins (*or* attempted to induce one AB to receive the said coins as genuine) knowing at the time of the said delivery (*or* attempt) though not at the time when you became possessed of the said coins, that the said coins were counterfeit and thereby committed an offence punishable under s 241 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof

242. Whoever, fraudulently or with intent that fraud may be committed, is in possession[2] of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit,[3] shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

[1] *Sooral*, (1872) 4 N W P 62.
[2] *Michael Byrne*, (1882) 6 Cox 475.
[3] *Sooral*, sup.
[4] *Ebrahim*, (1910) 79

COMMENT.

Mere possession of a counterfeit coin is an offence under this and the following section, even though no attempt is made to pass it off, provided it was kept for a fraudulent purpose, and was originally obtained with guilty knowledge. Possession must be with intent to defraud.

1. **'Fraudulently'.**—See s. 25, *supra.*
2. **'Possession'.**—See s. 235, *supra.*
3. **'Counterfeit.'**—See s. 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused was in possession of it.

(3) That he was in possession thereof, with intent to defraud, or with intent that fraud might be committed.

The accused may tender evidence to shew that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not[1].

(4) That at the time he became so possessed thereof, he knew it to be counterfeit.

When pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty[2].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 243.

Possession of Queen's coin by person who knew it to be counterfeit when he became possessed thereof.

243. Whoever, fraudulently[1] or with intent that fraud may be committed, is in possession[2] of counterfeit coin which is a counterfeit of the Queen's coin[3], having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

1. **'Fraudulently'.**—See s. 25, *supra.*
2. **'Possession'.**—See s. 235, *supra.*
3. **'Queen's coin'.**—See s. 230, *supra.*

PRACTICE.

Evidence.—Prove the same points as those for s. 242, showing in (1) that the counterfeit coin is a counterfeit of the King's coin. It is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit whether he was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account[3]. The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious[4].

1 Evidence Act (I of 1872), s. 21, ill. (*e*).
2 *William Rodgers,* (1839) 2 Moody 85.
3 *Fateh Chand Agarwala,* (1916) 44 Cal. 477, F. B.
4 *Ibid.*

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

.udulently (*or* with -pieces of counter- when you became hereby committed de, and within my

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge

Person employed in mint causing coin to be of different weight or composition from that fixed by law

244 Whoever, being employed in any mint lawfully established in British India[1], does any act, or omits what he is legally bound to do[2], with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT

The law has fixed the weight and composition of various coins and has declared in what cases they shall be a legal tender The object of this section is to secure the purity of the coinage and its exact conformity to the legal standard against the act or omission of persons employed in mints The proof must be that the person is employed in a Government mint, and that the act or omission which is the subject of the charge was intended to cause the coin there made issued to vary from the fixed standard It is no part of the definition and therefore it will be no necessary part of the proof that any wrongful gain should accrue to the person charged, or that loss should be caused to the Government or the public[1] See the Indian Coinage Act[2]

1. **'British India'.**—See s 15, *supra*

2. **'Legally bound to do'.**—See s 43, *supra*

PRACTICE.

Evidence —Prove (1) that the accused is employed in a lawfully established mint in British India

(2) That he, during such employment, did or omitted to do, something which h that mint to

(3,

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—*Triable by Court of Session*

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, being employed as—— in the——mint lawfully established in British India did an act, to ——, (*or*

[1] M & M 192 [2] Act III of

omitted what you were legally bound to do, to wit——) with the intention of causing the coin——issued from the said mint to be of a different weight (*or* composition) from the weight (*or* composition) fixed by law, and thereby committed an offence punishable under s. 244 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Unlawfully taking coining instrument from mint.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India[1], any coining tool or instrument[2], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The substance of this offence consists in taking a coining tool without lawful authority out of any mint for the purpose of using it for making counterfeit coins.

1. **'British India'**.—See s. 15, *supra*.
2. **'Instrument'**.—That is, coining instrument.

PRACTICE.

Evidence.—Prove (1) that the instrument in question is a coining tool or instrument.

(2) That it belonged to a mint lawfully established in British India.

(3) That the accused took it out of the mint without lawful authority.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, without lawful authority did take out of a mint lawfully established in British India, to wit the mint——, a certain coining tool (*or* instrument), to wit—; and thereby committed an offence punishable under s. 245 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Fraudulently or dishonestly diminishing weight or altering composition of coin.

246. Whoever fraudulently[1] or dishonestly[2] performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.

COMMENT.

Fraudulent or dishonest diminution in the weight or composition of a coin is punishable.

1. **'Fraudulently'**.—See s. 25, *supra*.
2. **'Dishonestly'**.—See s. 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin

(2) That the accused performed upon such coin the operation in question

(3) That such operation diminished its weight, or altered its composition

(4) That the accused did as above fraudulently or dishonestly

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Charge.—I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of—— at—— fraudulently (*or* dishonestly) performed on the coin to wit—— an operation which diminished its weight (*or* altered its composition) and you thereby committed an offence punishable under s 246 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* High Court)

And I hereby direct that you be tried (by the said Court) on the said charge

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Fraudulently or dishonesly diminishing weight or altering composition of Queen's coin.

PRACTICE

Evidence —Prove the same points as for s 246, showing in (1) that the coin in question is a King's coin

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Charge.—See s 246

248 Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

Altering appearance of coin with intent that it shall pass as coin of different description.

COMMENT

This section refers to any operation which alters the appearance of a coin with the intention that the said coin shall pass as a coin of a different description The operation, whether of gilding, or silvering or washing etc, must be of such [illegible] hich is subjected to it, is actually [illegible] a half piece so as to give it the [illegible] nishable under this section The offence is complete as soon as the coin is altered, though no fraudulent purpose [illegible] hat there is in fact a [illegible] the altered coin The [illegible] weight is diminished either s 246 or s 247 will apply

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin.

(2) That the accused performed on such coin the operation in question.

(3) That such operation altered the appearance thereof.

(4) That the accused did as above with the intention that such coin should pass as a coin of a different description.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, presidency or first class.

In the case of a previous conviction the accused should be committed for trial to the Court of Session unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence[1].

Charge.—See s. 249.

Altering appearance of Queen's coin with intent that it shall pass as coin of different description.

249. Whoever performs on any of the Queen's coin[1] any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

See Comment under the preceding section. The offence under this section is merely an aggravated form of the offence described in the last section.

1 **'Queen's coin'** —See s. 230, *supra*.

PRACTICE.

Evidence.—Prove the same points as those for s. 248, showing in (1) that the coin in question is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did perform a certain operation, to wit——, on a piece of the King-Emperor's coin known as——, with the intention that the said coin should pass as a coin of a different description, to wit-——; and that you thereby committed an offence punishable under s. 249 of the Indian Penal Code and within my cognizance (*or* cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Delivery of coin possessed with knowledge that it is altered.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently[1] or with intent that fraud may be committed, delivers such coin to any other person, or attempts

[1] Criminal Procedure Code, s. 348.

were sent for examination to the Calcutta Mint. The report of the Mint expert, which was duly proved at the trial, showed that a considerable number of the coins tendered were old and worn coins which had been used at one time as ornaments and from which the solder had only been partially removed in order to keep up their weight, whilst many more were coins of recent date which were not much worn but had been carefully subjected to a process of clipping or filing so as to reduce their weight to the lowest limit of wastage allowable under the law. It was held that the persons who had tried to get these coins changed were guilty of an offence under this section[1].

PRACTICE.

Evidence.—Prove (1) that a coin in question was one with respect to which the offence defined in s. 247 or 249 was committed.

Other points as in s. 250.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or First Class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, had in your possession a coin, to wit——, and in respect of which the offence defined in s. 246 (*or* s. 248 of the Indian Penal Code had been committed, and knowing at the time when you became possessed of the said coin that such offence had been committed, you fraudulently (*or* with intent that fraud may be committed) delivered such coin to AB (*or* attempted to induce the said AB to receive the same) and thereby committed an offence punishable under s. 251 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Possession of coin by person who knew it to be altered when he became possessed thereof.

252. Whoever fraudulently[1], or with intent that fraud may be committed, is in possession[2] of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Possession of debased or altered coin by the professional dealer, with fraudulent intention, is made punishable by this section. This and the following section resemble ss. 242 and 243. Under ss. 250 and 251 the accused is punished for uttering, under this and the next section he is punished for possessing a coin in respect of which the offence defined in either s. 246 or 247 has been committed.

1. **'Fraudulently'.**—See s. 25, *supra*.
2. **'Possession'.**—See s. 235, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was in possession of a coin.

(2) That it was a coin in respect of which the offence defined in s. 246 or 248 had been committed.

[1] *Mahtab Rai*, (1925) 48 All. 603

(3) That the accused knew of it when he became possessed of the coin

(4) That he was so possessed of the coin with intent to defraud, or with intent that fraud might be committed

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Possession of Queen's coin by person who knew it to be altered when he became possessed thereof

253 Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine

COMMENT

The offence under this section is an aggravated form of the offence described in the last section See Comment on the preceding section

PRACTICE

Evidence —Prove the same points as those for s 252 showing in (1) that the coin in question was a King's coin

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate Presidency or first class

Delivery of coin as genuine which when first possessed the deliverer did not know to be altered

254 Whoever delivers to any other person as genuine or as a coin of a different description from what it is or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed

COMMENT

Section 241 is similar to this section Where possession is acquired innocently but on subsequent knowledge that the coin is counterfeit if a person passes it off or attempts to pass it off as a genuine coin he will be punished under this section

See the Metal Tokens Act s 3[1]

PRACTICE

Evidence —Prove (1) that the coin in question is one with respect to any such operation as that mentioned in s 246 247 248 or 249 has been ,

[1] Act I of 1889

(2) That the accused delivered it to some one; or that he attempted to induce some one to receive it.

(3) That he so delivered it, or attempted to induce some one to receive it, as a genuine coin, or as a coin of a different description.

(4) That at the time he did so, he knew that it had been operated upon.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, delivered to AB (*or* attempted to induce AB to receive) as genuine a coin, to wit——, in respect of which an operation as is mentioned in s. 246, 247, 248 *or* 249 of the Indian Penal Code, to wit——, had been performed, and you thereby committed an offence punishable under s. 254 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Counterfeiting Government stamp.

255. Whoever counterfeits[1], or knowingly performs any part of the process of counterfeiting, any stamp[2] issued by Government[3] for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

COMMENT.

The remaining sections of this Chapter deal with offences relating to Government stamps. These stamps are impressions upon paper, or parchment, or any material used for writing made by Government, mostly for the purpose of revenue.

This section is similar to s. 241 which deals with counterfeiting of coins.

1. 'Counterfeits'.—See s. 28, *supra*. Engraving a stamp, like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, amounts to counterfeiting a stamp[1].

2. 'Stamp'.—This word is used in this and the following sections to denote the impression or mark set upon the paper, parchment, etc. It includes postage stamps[2].

The word 'stamp' must be construed according to its ordinary meaning in the English language. An obliterated stamp can be a stamp in the ordinary use of the English language. A stamp does not cease to be a stamp because it is cancelled. A person selling a forged stamp, although it bears a cancellation mark, commits an offence of selling forged stamps[3].

3. 'Government'.—See s. 17, *supra*, and s. 263A (4), *infra*.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purposes of revenue.

(2) That the accused made such counterfeit; or that he knowingly performed any part of the process of counterfeiting.

1 *Thomas Collicot*, (1812) 2 Leach 1048.
2 Indian Post Office Act VI of 1898, ss. 16 and 17.
3 *Lowden*, [1914] 1 K. B. 144.

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at—— counterfeited (*or* knowingly performed a certain part of the process of counterfeiting to wit——) a certain stamp issued by Government for the purpose of revenue to wit—— and thereby committed an offence punishable under s 255 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Having possession of instrument or material for counterfeiting Government stamp

256 Whoever has in his possession[1] any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

COMMENT

See Comment on the preceding section This section resembles s 235 with which it may be compared

1 '**Possession** —See ss 27 and 235 *supra* The proprietor of a newspaper

was subsequently kept in his possession was for making upon the pages of an
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sion without lawful excuse within the meaning of the Post Office Act 1884 s 7 (c) which says that a person shall not make or unless he shews a lawful excuse have in his possession any die plate instrument or materials for making any fictitious stamps [1]

PRACTICE

Evidence —Prove (1) that the instrument or material in question is one usable for counterfeiting stamps

(2) That the stamps so produceable thereby are counterfeits of those issued by Government for the purposes of revenue

(3) That the accused had such instrument or material in his possession

(4) That the same was in possession of the accused for the purpose of its being used to counterfeit such Government stamps or that the accused knew or had reason to believe that such instrument or material was intended to be so used

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

[1] *Dickens* v *G H* [1896] 2 Q B 310

257. Whoever makes or performs any part of the process[1] of making, or buys or sells or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe[2] that it is intended to be used, for the purpose of counterfeiting any stamp[3] issued by Government[4] for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or selling instrument for counterfeiting Government stamp.

COMMENT.

This section corresponds to s. 234.

1. **'Performs any part of the process'.**—It is not necessary that the instruments should be capable of making an entire impression of a stamp[1].

2. **'Reason to believe'.**—See s. 26, *supra.*

3. **'Stamp.'**—See s. 255, *supra.*

4. **'Government'.**—See s. 263A, *infra.*

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one usable for counterfeiting stamps.

(2) That the stamps so produceable thereby are counterfeits of those issued by Government for the purpose of revenue.

(3) That the accused made, or performed, some part of the process of making such instrument; or that he bought, sold, or diposed of such instrument.

(4) That he did as above in order that such instrument might be used for the purpose of counterfeiting such stamp; or that the accused knew or had reason to believe that the same was intended to be used for such purpose.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, made (*or* performed any part of the process of making *or* bought *or* sold *or* disposed of) an instrument, to wit——, for the purpose of being used (*or* knowing *or* having reason to believe that it was intended to be used) for counterfeiting a stamp, to wit——, issued by Government for the purpose of revenue, and thereby committed an offence punishable under s. 257 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sale of counterfeit Government stamp.

[1] *Foster,* (1836) 7 C. & P. 494.

COMMENT

See Comment on s 255 *supra* A person selling a forged stamp although it bears a cancellation mark commits an offence of selling forged stamps[1]

This section resembles s 239

PRACTICE

Evidence Prove (1) that the counterfeit was that of a stamp issued by Government for the purposes of revenue

(2) That the accused sold or offered to sell such counterfeit stamp

(3) That when selling or offering the same for sale he knew or had reason to believe that the same was counterfeit

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at—— sold (*or* offered for sale) a stamp to wit—— which you knew (*or* had reason to believe) to be counterfeit of the stamp—issued by the Government for the purpose of revenue and thereby committed an offence punishable under s 258 of the Indian Penal Code and within the cognizance of the Court of Session

And I hereby direct that you be tried by the said Court on the said charge

Having possession of counterfeit Government stamp

259 Whoever has in his possession[1] any stamp[2] which he knows to be a counterfeit[3] of any stamp issued by Government[4] for the purpose of revenue intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

COMMENT

This section resembles s 243

1 **Possession** —See ss 27 and 235 *supra*

2 **'Stamp** —See s 255 *supra*

3 **'Counterfeit** .—See s 28 *supra*

4 **'Government** —See s 263A *infra*

PRACTICE

Evidence —Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue

(2) That the accused has such counterfeit stamp in his possession

(3) That he then knew the same to be counterfeit

(4) That he was so possessed intending to use or dispose of the same as a genuine stamp or that he was so possessed thereof in order that the same may be used as a genuine stamp

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or Magistrate Presidency or first class

[1] *Lowden*, [1914] 1 K B 144

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the —— day of——, at——, were in possession of a stamp, Exhibit——, which you knew to be a counterfeit of a stamp, to wit——, issued by Government for the purpose of revenue, intending to use (*or* dispose of) the same as a genuine stamp and thereby committed an offence punishable under s. 259 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Using as genuine a Government stamp known to be counterfeit.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

See Comment on s. 255. This section corresponds to s. 254.

Here the stamp used as genuine must be a counterfeit stamp. Hence, where a person sold a one-anna stamp as a one-rupee stamp, it was held that he had committed no offence under this section, but was guilty of cheating under s. 415[1].

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused knew the same to be counterfeit.

(3) That he used such counterfeit stamp with such knowledge.

(4) That he used the same as a genuine stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, used as genuine a stamp, to wit——, knowing it to be a counterfeit of a stamp issued by Government for the purpose of revenue, to wit——, and thereby committed an offence punishable under s. 260 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.

261. Whoever fraudulently[1], or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document[2] for which such stamp has been used, or removes from any writing or document, a stamp which has been used for such writing or document in order that such stamp may be

[1] *Shuroop Chunder Doss*, (1865) 2 W. R. (Cr.) 65.

used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section provides penalty for (1) the effacing of a writing from a stamp, and (2) the removing of a stamp from a document The intention may be to defraud some one or to cause loss of revenue to Government The section resembles ss 246 and 248 which provide punishment for the alteration and defacement of a coin

1. **'Fraudulently'** —See s 25 *supra*.
2. **'Document'**.—See s 29, *supra*

PRACTICE.

Evidence —Prove (1) *that the stamp was issued by Government for revenue purposes*

(2) That such stamp had been used as such on the substance in question

(3) That the accused removed or effaced from such stamp some of the writing for which it had been used

(4) That he did so with intent to defraud or to cause loss to Government

Or prove points (1) and (2) as above, and further—

(3) That such stamp had been used as such for a writing or document.

(4) That the accused removed the stamp from such writing or document

(5) That he did so in order that such stamp might be used for a different *writing or document*

(6) That he did so with intent to defraud or to cause loss to Government

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, fraudulently (*or* with intent to cause loss to the Government) [removed (*or* effaced) from any substance bearing any stamp issued by Government for the purpose of revenue any writing (*or* document) for which such stamp had been used] *or* [removed from any writing (*or* document) a stamp which had been used for such writing (*or* document) in order *that such stamp may be used for a different writing (or document)*], *and thereby* committed an offence punishable under s 261 of the Indian Penal Code and within

Court (*in cases tried by*

262. Whoever fraudulently[1], or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Using Government stamp known to have been before used.

COMMENT.

Under this section fraudulent use of a stamp already used is made punishable

1. **'Fraudulently'.**—See s. 25, *supra*. The mere affixing to a letter of a postal stamp which has been previously used does not of itself prove fraud or an intent to cause loss to Government[1]; but if a person uses a postage stamp twice he will be punished under this section[2].

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for the purposes of revenue.

(2) That it had been already used for such purpose.

(3) That the accused afterwards again used such stamp.

(4) That when he used it again he knew that it had been before used.

(5) That he again so used the stamp with intent to defraud or to cause loss to Government[3].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Erasure of mark denoting that stamp has been used.

263. Whoever fraudulently[1], or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Under this section three things are punishable: (1) erasure or removal of a mark denoting that a stamp has been used, (2) knowingly possessing any such stamp and (3) selling or disposing of any such stamp.

1. **'Fraudulently'.**—See s. 25, *supra*.

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Goverment for the purpose of revenue.

(2) That it had been used for that purpose.

(3) That it bore a mark or impression denoting that it had been so used.

(4) That the accused removed or erased such mark or impression.

(5) That when he so removed or erased such mark or impression, he did so with an intention to defraud or to cause loss to Government.

Or prove points (1), (2), (3) and (4) as above, and further—

(5) That the accused had possession of such stamp in such cancelled condition; or that such stamp, in such cancelled condition, was sold or disposed of by the accused.

(6) That the accused at the time knew that such mark or impression had been so removed or erased.

(7) That he had a fraudulent intention, or had the intention to cause loss to Government, when he had such possession, or made such sale or disposal,

1 *Niaz Ahmad*, (1881) 8 A. W. N. 56.
2 *Sitaram*, (1882) 5 C. P. L. R. (Cr.) 43.
3 *Murlidhar*, (1880) Unrep. Cr. C. 145.

Or prove points (1), (2) and (3) as above and further—

(4) That the accused sold or disposed of such stamp

(5) That he, when selling or disposing of the same knew that it had been so used

(6) That he had a fraudulent intention or had the intention to cause loss to Government, when so selling or disposing of it

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class

Prohibition of fictitious stamps **263A** (*1*) Whoever—

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp or

(*c*) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees

(*2*) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited

(*3*) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose

(*4*) In this section and also in sections 255 to 263, both inclusive, the word "Government," when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

COMMENT

This section is exactly the same as s 7 of the English Post Office Act 1884[1].

Object.—This section was added by Act III of 1895, s 2, and is intended to give full effect to what is known as the Vienna Convention in respect of postage, and it provides for making it an offence to make fictitious stamps, which are defined to be stamps purporting to be used for purposes of postage whether by the British or any foreign Government It was introduced at the instance of the Post office for the purpose of stopping the use of fictitious stamps on letters coming from abroad

1 47 & 48 Vic.,

Possession of a fictitious stamp without lawful excuse is an offence. The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad from which imitations or representations of a current colonial postage stamp could be produced. The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for marking upon the pages of an illustrated stamp catalogue or newspaper called "The Philatelist's Supplement", illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse[1].

PRACTICE.

Evidence.—Prove (1) that the accused made, knowingly uttered, dealt in, or sold the fictitious stamp in question. or knowingly used it for any postal purposes; or

(2) That he had in his possession, without lawful excuse, such stamps; or

(3) that he made, or, without lawful excuse, had in his possession any die, plate, instrument, or materials for making such stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

[1] *Dickins* v. *Gill*, [1896] 2 Q. B. 310.

CHAPTER XIII.

Of Offences relating to Weights and Measures.

The offences punishable by this Chapter are not defined with reference to ... stablished by law A false weight ... v or the ordinary usage of the place, ... s to have fixed on certain known in ... to which two persons deal together— ... r weight or measure in order to defraud[1] ... But by the Indian ... corresponding to the ... d of weight Later an Act entitled the Measures of Length Act[3] was passed by which the ...

... throughout the particular town or district[4]

264 Whoever fraudulently uses any instrument for weighing[1] which he knows to be false[2], shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

Fraudulent use of false instrument for weighing

COMMENT

The sections relating to weights make no mention of standard weights In every place there are well known customary weights and if any resident of the place or other person knowing that a weight is less than the customary weight which it purports to be, uses the weight dishonestly he commits fraud, and may be punished under Chap XIII[5]

As to inspection of weights and measures by police s 153 Criminal Procedure Code, provides '(1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false (2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction'

Ingredients —This section requires two essentials —

1 Fraudulent use of an instrument for weighing
2 Knowledge that such instrument is false.

1 M & M 201
2 Act XXXI of 1871 s 2
3 Act II of 1889 ss 2 7
4 ... City Municipalities Act (XVIII of 19..), s. 177 the City of Bombay Police Act (Bom Act IV of 1902) s 54 Police Duties and Powers of Magistrate (Bombay) Regulation XII of 1827, s. 20 the Burma Municipal Act (Burma Act III of 1898) s 142 (o) the Burma Excise Act (Burma Act V of 1917) s. 21
5 Per Hosking J C., in *Ma Ein Me*, (1897) P J L B 354

1. 'Fraudulently using any instrument of weighing'.—See s. 25, *supra.* Intention is an essential part of the offence under this section[1]. "The intention however must be alleged in laying the charge, though it may be matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may of course be rebutted...But where the incorrectness of the scale is so visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance. On the other hand a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of the chapter"[2]. A one *tolah* below weight in a five seers only represents a fair wear and tear, and is no evidence of a fraudulent intention[3].

2. 'Knows to be false'. The word 'false' in this and the following sections means different from the instrument, weight or measure, which the offender and the person defrauded have fixed upon, expressly or by implication, with reference to their mutual dealings[4]. A railway company kept a weighing machine, which for a fortnight had been so out of repair that, when anything was weighed by it, the weight appeared to be four pounds more than was really the weight. It was held that the company was liable to be convicted for having in its possession a weighing machine which on examination was found to be incorrect or otherwise unjust[5].

PRACTICE.

Evidence. Prove (1) that the instrument in question is one for weighing.
(2) That it is a false one
(3) That the accused knew it to be false.
(4) That he used it knowing it to be so.
(5) That he did as above with intent to defraud.

Procedure. Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the —— day of ——, at ——, fraudulently used a certain instrument for weighing, to wit ——, knowing it to be false at the time of using it, and thereby committed an offence punishable under s. 264 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Fraudulent use of false weight or measure.

265. Whoever fraudulently[1] uses any false[2] weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Section 264 punishes one who uses a false balance; this section punishes one who uses a false weight or measure.

1 *Kangalee Muduk,* (1872) 18 W. R. (Cr.) 7.
2 2nd Rep., ss. 220, 221.
3 *Bikka Mal,* (1883) 3 A. W. N. 224.
4 Stokes' Anglo-Indian Codes, Vol. I. p. 193.
5 *Great Western Ry. Co. v. Bailie,* (1864) 34 L. J. M. C. 31.

To ascertain whether a measure is false or not the only proper test to apply is that of the measure and the same articles must be measured in each case and proof should be adduced that this had been done The weight of the grain that a measure is found to hold is no evidence of its capacity as compared with that of another measure unless the very same grain is used[1]

1. **'Fraudulently** —See s 25 *supra*

2 **'False'.**—See s 261 *supra* The false weight or measure must be a prescribed weight or measure Where the accused sold liquor measuring it with a glass which was not the prescribed measure and of which they falsely misrepresented the capacity it was held that they had not committed an offence under this section but one under s 415[2] Selling by means of an unstamped measure does not in the absence of evidence of fraud or falsity of the measure constitute this offence[3]

PRACTICE

Evidence —Prove (1) that the weight or measure is a false one or that it is different from what it was used as

(2) That the accused used such false or different weight or measure

(3) That he did as above with intent to defraud

A conviction under this section cannot be maintained where there is no complaint by a purchaser[4]

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency or first or second class—Summary trial

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at—— [fraudulently used a false weight (*or* false measure of length or capacity)] *or* [fraudulently used a weight (*or* measure of length or capacity) as a different weight (*or* measure) from what it was] and thereby committed an offence punishable under s 265 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

Being in possession of false weight or measure

266 Whoever is in possession[1] of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used[2], shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

COMMENT

This section punishes a person who is in possession of a false weight or measure just as ss 235 239 and 240 punish a person who is in possession of counterfeit coins and s 259 punishes a person who is in possession of a counterfeit stamp

1 **'Possession** —The mere possession of false weights or measures will not of itself raise any strong presumption of fraud as the weights or measures may have been put away so as not to be used The fraudulent intent will be shown greatly by the place where they are found Suppose a false balance was

1 *Lakshman Martand* (1898) Unrep Cr C 989

2 *Virod n.* (1888) Cr R No 36 of 1888, Unrep Cr C 386.

3 *Achi* (1887) 1 Weir 293.

4 *Sobha* (1907) P W R. (Cr) No. 33 of 1908

found fixed to a tradesman's counter where he was accustomed to sell his goods, and there was no other in the place. There would be, in the case, the strongest possible presumption that the possession was not innocent. On the other hand, suppose he had true balances in his shop, but an untrue one stowed away in an attic with a lot of lumber, there the presumption would be against fraud.

But the mere possession of the false instrument, if such possession cannot be satisfactorily explained and accounted for, is sufficient ground for presuming an intention to use it fraudulently.

As to the definition of the word "possession" see s. 27.

2. 'Knows to be false ...fraudulently used'.—It is necessary to prove that the accused knew the scales to be false and intended to use them fraudulently. The mere possession of the scales, or evidence of their use, with a string not accurately tied at the centre of the beam, so that one scale outweighed the other, but which could be shifted at any time, and might sometimes have been accurately tied, was held *not of itself sufficient evidence of fraud*[1]. The *mere possession* of weights in excess of the authorized standard will not support a conviction[2].

A person who professes to sell by a certain standard of weight is bound to take reasonable care that the weights he uses are not defective[3]. He is bound to *see that the measure is correct according to that standard and if the measure varies* from the standard so as to give the seller a considerable advantage, the Courts are justified in inferring fraud[4]. The accused professed to sell by weights of a certain English standard. It was admitted that the weights were habitually used and were in the possession of the accused for the purpose of being used. The weights were all deficient, but the Sessions Judge was of opinion that there was an absence of fraud, because the weights had been openly and therefore presumably ignorantly used. It was held that the accused was guilty of an offence under this section[5].

'Fraudulently'.—See s. 25, *supra*. Where standard weights are not prescribed no presumption of fraud can arise in respect of short weights, and a conviction under this section cannot be obtained unless the element of fraud is strictly proved[6].

Where a search took place after dark without proper precautions, and there was absence of proper description of the weights seized and there was silence of the record as to what standard weights were used for purposes of comparison, and there was no proof of knowledge or fraudulent intent on the accused's part, it was held that these were fatal defects in a prosecution under this section[7].

PRACTICE.

Evidence.—Prove (1) that the instrument, or the measure, or the weight in question is false.

To prove that the weight or measure is false, comparison should be made with standard weights or measures. Some reasonable allowance should be made for wear and tear and for the rough and ready methods of bazaar shop-keepers[8].

(2) That the accused was in possession of the same.

(3) That he knew the same to be false.

(4) That he intended that such false weight, etc., should be used to defraud some one.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

1 *Hamirmal*, (1890) Cr. R. No. 36 of 1890, Unrep. Cr. C. 514; *Harak Chand Marwari*, (1917) 15 A. L. J. 897.
2 *Damodhar Dalji*, (1864) 1 B. H. C. 181.
3 *Appasami* alias *Munisami*, (1884) 1 Weir 225.
4 *Venkata Chetti*, (1883) 1 Weir 225.
5 *Meetalagath Poker*, (1883) 1 Weir 223.
6 *Mi Ya Pyan*, (1908) U. B. R. (P. C. 17).
7 *Sobha*, (1902) P. W. R. (Cr.) No. 38 of 1908.
8 *Nanak Chand*, (1913) P. R. No. 20 of 1913.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, were in possession of a certain instrument for weighing (*or* of a certain weight, *or* of a certain measure

our possession, to

used, and thereby

Code, and within

my cognizance.

And I hereby direct that you be tried on the said charge

267. Whoever makes, sells or disposes of any instruments for weighing, or any weight, or any measure of length or capacity which he knows to be false[1], in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

Making or selling false weight or measure

COMMENT

This section punishes a person who makes sells or disposes of a false balance weight or measure The object is to prevent the circulation of false scales weights or measures

1. **'False'.**—See s 264, *supra*

PRACTICE

Evidence.—Prove (1) that the instrument, or the measure or the weight in question, is false

(2) That the accused either made sold, or disposed of the same

(3) That he then knew it to be false

(4) That he so made sold, or disposed of it in order that it might be used as true, or that he knew that it was likely to be used as true

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, made (*or* sold *or* disposed of) a certain instrument for weighing (*or* a certain weight *or* a certain measure of length *or* capacity) to wit——, knowing at the time of making (*or* selling *or* disposing of) it, to be false in order that the said instrument might be used as true (*or* knowing that the said instrument was likely to be used as true) and thereby committed an offence punishable under s 267 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

Public nuisance.

268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission[1] which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity[2], or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right[3].

A common nuisance is not excused on the ground that it causes some convenience[4] or advantage.

COMMENT.

Nuisances are of two kinds: (1) Public, and (2) Private.

(1) 'Public' nuisance or common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of the whole community in general, or by neglecting to do anything which the common good requires. It is an act affecting the public at large, or some considerable portion of them: and it must interfere with rights which members of the community might otherwise enjoy. It depends in a great measure upon the number of houses and the concourse of people in the vicinity; and the annoyance or neglect must be of a real and substantial nature. Acts which seriously interfere with the health, safety, comfort, or convenience of the public generally, or which tend to degrade public morals, have always been considered to be public nuisances.

Persons who carry on offensive trades and thereby, or by any other offensive means, corrupt the air, or by any means cause loud and continued noises and thereby occasion injury or annoyance to those dwelling in the neighbourhood in respect of their health, or comfort and convenience of living, or the value of their property, are liable to a prosecution for causing a public nuisance[1]. "It does not appear to me a *sine qua non* that such an annoyance as this should injuriously affect every member of the public within its range of operation. It is sufficient that it should affect people in general who dwell in the vicinity"[2]. A brew-house, glass-house or swine-yard may be a public nuisance if it is shown that the trade is such as to render the enjoyment of life and property uncomfortable. Erecting gunpowder mills or keeping gunpowder magazines near a town, keeping large quantities of naphtha near dwelling-houses, blasting stone near a highway, keeping large quantities of materials for making fireworks near a street, working rice-husking machine at night in a residential quarter of a city[3], and keeping disorderly houses, e.g., disorderly inns, bawdy houses, gaming houses, and committing acts of indecency in public places have been held to be public nuisances.

A public nuisance can only be the subject of one indictment, otherwise a party might be ruined by a million suits. An indictment will fail if the nuisance complained of only affects one or few individuals.

As to when an individual can bring a civil action in respect of a public nuisance, see the authors' Law of Torts, 10th edition.

[1] 7th Parl. R., p. 57.
[2] Per Anderson, J., in *Phiraya Mal.* (1904) P. R. No. 9 of 1904.
[3] *Ibid.*

(2) 'Private nuisance' is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another and not amounting to trespass It is an act affecting some particular individual or individuals as distinguished from the public at large It is in the *quantum* of annoyance that public nuisance differs from private It cannot be the subject of an indictment but may be the ground of a civil action for damages or an injunction or both

The various sections of this Chapter deal with everything that is regarded as nuisance in English law Section 290 is a general provision intended to cover a case not specially provided

Ingredients —The section requires two essentials—

1 A person must do an act or must be guilty of an illegal omission

2 Such act or omission must cause

(*a*) common injury danger or annoyance (*i*) to the public or (*ii*) to the people in general who dwell or occupy property in the vicinity, or

(*b*) injury, obstruction danger or annoyance to persons who may have occasion to use any public right

1 **'Person does any act or is guilty of an illegal omission'.**—Section 11 defines the word 'person'

The word 'act' is defined in s 33 *supra* It is used in this section in the sense of positive conduct only, not negative conduct or omission to do something as the expression 'illegal omission' is specifically used in conjunction with it

The word 'illegal', as defined in s 43 is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action Every omission causing a nuisance is not punishable The omission must be 'illegal' Thus a person omitting to fence a wall on a private ground [illegible] eight yards of a highway[1], and a person omitting to keep his [illegible] from straying were held to have committed no nuisance Similarly [illegible] Lombardars of a village, who were making arrangements [illegible] held at that village for the public sanitation of the place, did not make [illegible] arrangements when a fair was held and for which they were [illegible] nuisance, it was held that their omission to make proper sanitary [illegible] was not an illegal omission within the meaning of this section[4].

Liability of absent proprietor for nuisance committed by his servant.—[illegible] the use of premises gives rise to a public nuisance it is generally the [illegible] the time being who is liable for it, and not the absent proprietor

2 **'Causes common injury, danger or annoyance to the public who dwell or occupy property in the vicinity'.**—The [illegible] in this section must be common, i e, it must affect the public [illegible] individual Thus a person trotting rams trained to [illegible] person fouling the water of a streamlet by putting [illegible]

[illegible]

street[9], and a person allowing prickly pear to spread [illegible] road [illegible] public[10], were held guilty of a public nuisance Throwing rubbish [illegible] own garden does not amount to public nuisance[11] [illegible] should [illegible] however, that every act which causes an offensive [illegible] does not [illegible]

[1] *Anthony Udayan* (1883) 6 Mad 290

[2] *Joynath Mundul v Jamul Sheikh* (18[illegible]) 6 W R 71

[3] *Vallapoo Koladu* (1894) 1 Weir 244

[4] *Guj Singh* (1875) P R No 11 of 1875

[5] *Bibhuti Bhusan Biswas v Bhuban Ram* (1918) 46 Cal 513 22 C W N 1062, 29 C L J 222

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible]

constitute this offence[1]. Villagers accumulating filth and manure in their villages are not guilty of public nuisance[2].

The 'annoyance' must also be caused to the general public. An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place. Where, therefore, from the noise made by a tinman in carrying on his trade three members of an inn were disturbed in the occupation of their chambers, it was held that the nuisance was not of a sufficiently general extent to support an indictment[3]. The defendant had converted his land near a public highway into a shooting ground where persons came to shoot with rifles at a target, and also at pigeons. As the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held that the act of the accused amounted to a public nuisance[4]. Again, the injury or annoyance must not be fleeting or evanescent[5]. It must be such as reasonable persons would complain of[6].

The Allahabad High Court has held that annoyance to one individual is sufficient. Where a public servant, whose duty it was to keep the streets clean, saw somebody easing himself and, therefore, he reported it in his official capacity, and gave evidence of the act, it was held that it was a reasonable inference to draw that he was annoyed[7].

The word "public" includes any class of the public or any community (s. 12). The expression "people in general" means a body or considerable number of persons[8]. This section does not apply to acts or omissions calculated to offend the sentiments of a class. *Lex non favet vots delicatorum*—the law makes no allowance for the susceptibilities of the hypersensitive. "In this country (India) it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of adherents of other creeds residing in the neighbourhood, but the Penal Code does not regard such an act as a public nuisance"[9]. Similarly, the slaughtering of kine by the Mahomedans may injure the susceptibilities of the Hindus but it will not be deemed to be a public nuisance unless the act is done in such places or such a manner as to be a nuisance[10]. It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law even though he may thereby hurt the susceptibilities of others[11]. The scope of this section is to protect the public or people in general, as distinguished from the members of a sect.

No nuisance where there is no annoyance to the public.—A prostitute visiting a daksbungalow at the request of a person staying there[12]; a person committing bare oolicitation of chastity[13]; a person soliciting passers-by on a public road for purpses of prostitution[14]; a person merely placing cowdung cakes by the side of a road to dry[15]; a person placing a cot temporarily on a public road[16]; a person selling fish near or on a public road[17]; a person enclosing land which was a village site and property of Government[18]; a person refusing to have any social

1 *Shewoo*, Weir (3rd edn.) 11.
2 *Buta Singh*, (1872) P. R. No. 25 of 1872; *Guj Singh*, (1875) P. R. No. 11 of 1875.
3 *Allen* v. *Lloyd*, (1802) 4 Esp. 199.
4 *Charles Moore*, (1832) 3 B. & Ad. 184.
5 *Benjamin* v. *Storr*, (1874) L. R. 9 C. P. 400, 407.
6 *Attorney-General* v. *Corporation of Nottingham*, [1904] 1 Ch. 673.
7 *Lallu Ram*, (1923) 21 A. L. J. 772.
8 *Nga Tun U*, (1902) 1 L. B. R. 213.
9 Per Turner, C. J., in *Muttumira*, (1884) 7 Mad. 590, 591; *Ramditta* v. *Kirpa Singh*, sup.
10 *Zakhiuddin*, (1887) 10 All. 44.
11 *Shahbaz Khan* v. *Umrao Puri*, (1908) 30 All. 181.
12 *Musumat Begum*, (1870) 2 N. W. P. 349.
13 *Raji*, (1895) Cr. R. No. 28 of 1895, Unrep. Cr. C. 765.
14 *Nanni*, (1899) 22 All. 113.
15 *Bapu Jaga*, (1886) Cr. R. No. 42 of 1886, Unrep. Cr. C. 297.
16 *Kamla Prasad*, (1912) 10 A. L. J. 263.
17 *Paung Tha Bi*, (1880) S. J. L. B. 94.
18 *Nevor Parivatappa*, (1900) 1 Weir 245.

intercourse with persons belonging to *shumsees* or to associate with them as Hindus[1], a person skinning an animal which has died a natural death[2], and a

order to

a neigh

Gambling—A common gaming house to which every one who chooses to pay is able to go is necessarily a nuisance and no evidence of any actual annoyance to the public is in such a case required But a person who admits gamblers into his house and every person who games therein is not guilty of this offence in the absence of such evidence[4] Where a lessee of a house permitted disorderly people to use it for gambling and thereby caused annoyance to the public he was convicted of this offence[5] Persons who sat on a public road outside a village and induced villagers to gamble[6], and persons who gambled in a market place[7] were held to have committed a public nuisance Similarly, where the accused allowed a large crowd of people to collect near their shops with a view to carry on satta (gambling)

the street for half

The Court observed

nuisance the person

who is directly responsible for the crowd collecting is obviously not less but more guilty than the other persons who form the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared No one is allowed to make use of his premises in such a way as to interfere with the rights of the public [8]

The Calcutta High Court has ruled that gambling is not an offence as is defined in this section Where, therefore certain persons were found to have gambled at a place where the Gambling Act was not in force and convicted under s 290, it was held that the conviction was bad[9] In a Burma case the Judicial Commissioner said ' It is quite clear that however pernicious may be the results of gambling whether in a private house or in a common gaming house the mere act of gambling cannot be regarded as a public nuisance within the Penal Code It would be as reasonable to punish people who hold *pues* or keep grogshops as being guilty of a public nuisance on the ground that *pues* and drinking frequently 'endanger the public peace and safety ' [10].

Lawful cremation is not a nuisance —When persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to[11] But the owner of a private cremation ground may be liable for a nuisance if he allows the cremation of bodies upon the ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood[12]

Offending the sentiments of a class is no nuisance —Where Mahomedans residing in a Hindu village, erected, in the neighbourhood of a Hindu temple

1 *Ramdulla* v *Kirpa Singh* (1882) P R No 3 of 1883

2 *Beni* (1914) 12 A L J 349

3 *Ram Charan Ahir* (1923) 20 O C 203 3 O W N 523.

4 *Hau Naiji* (1870) 7 B H C (Cr C.) 74 (1870) 1 Weir 240 *Dustoor Khan* (1867) P R No 16 of 1867

5 *Thandavaraya Ji* (1891) 14 Mad 364 *Pogier* (1821) 1 B & C 2 2

6 (1878) 1 Weir 239

7 *Bethan Chetti* (1881) 1 Weir 242

8 *Happoo Mal* (19 4) 22 A. L J 662 663, *Noor Mahomed*, (1911) 13 Bom L R 269 1 Bom Cr C. 23

9 *Sasi Kumar Bose* (1903) 7 C W N 710 See to the same effect *Managil Karuan* (1891) 1 Weir 240

10 Per Ward J C in *Nga Shwe Nyo* (1884) S J L B 279

11 *Saminadha Pillai* (1896) 19 Mad 461

12 *Indra Nath B ..jee* (189) 25 Cal 4..

a shed containing a religious symbol[1]; where a person cut up meat on his *veranda* and exposed it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by[2]; where a person kept a shop open for the sale of meat though the sight of meat was offensive to the sentiments of a section of the public[3]; and where Mahomedans for a religious purpose killed and cut up two cows before sunrise in a private compound partly visible from a public road[4], this offence was not committed. But it would be a public nuisance if a person wilfully slaughtered cattle in a public street so that the groans and blood of the poor beasts were heard and seen by passers-by.

3. 'Which must necessarily cause injury, etc., to persons who may have occasion to use any public right'.—The persons referred to in this clause can seek a criminal remedy for apprehended injury. Under this clause common injury to the public or neighbours need not be shown; any individual might complain, provided he is interfered with in respect of a public right, e.g., obstruction caused by building over a part of a public street. Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits public nuisance under this section[5]. If any portion, however small, of a public street is encroached upon, the inevitable result must be to cause obstruction to persons who may have occasion to use the highway, for the public is entitled to use every inch of a road that has been dedicated to the public[6].

The Calcutta High Court held in a case where persons placed a bamboo stockade across a tidal navigable river for the purpose of fishing, although they left in such stockade a narrow opening for the passage of boats, which passage was kept closed except on the actual passage of boats, that they were guilty of a public nuisance[7]. But subsequently it held that an encroachment, however slight, on a tidal navigable river would not constitute this offence. There must be some evidence that such encroachment caused one of the results specified in this section[8]. The Lahore High Court[9] has agreed with the view expressed in the former case and has dissented from the view expressed in the latter case.

A person who filled up a portion of a ditch or drain which formed part of a public way and which belonged to the public[10] was guilty of this offence. Similarly, letting loose cattle at night on a road amounts to this offence[11].

4. 'Nuisance not excused on the ground that it causes some convenience or advantage'.—It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any of the public[12]. If a public nuisance is proved, it is generally useless to set up counterbalancing benefits; nor in deciding whether a thing is or is not a public nuisance can the good it does be weighed against the public annoyance which it causes[13].

No prescriptive right can be acquired to commit nuisance.—No prescriptive right can be acquired to maintain, and no length of time can legalize, a public nuisance. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of

1 *Muttumira*, (1894) 7 Mad. 590.
2 *Byramji Edulji*, (1887) 12 Bom. 437.
3 *Hasan Samad*, (1897) Cr. R. No. 13 of 1897, Unrep. Cr. C. 903; *Eesa* v. *Keemoo*, (1867) P. R. No. 18 of 1867; *Assa Nand* v. *Hoosein Buksh*, (1868) P. R. No. 15 of 1868.
4 *Zakhiuddin*, (1887) 10 All. 44.
5 *Virappa Chetti*, (1896) 20 Mad. 433.
6 *Nisar Muhammad Khan*, (1925) 6 Lah. 203.
7 *Umesh Chandra Kar*, (1887) 14 Cal. 656.
8 *Jugal Das Dalal*, (1893) 20 Cal. 665.
9 *Nisar Muhammad Khan*, sup.
10 *Roopnarain Dutt*, (1872) 18 W. R. (Cr.) 38.
11 *Kasayi Ahmed*, (1882) 1 Weir 238.
12 Stephen's Digest of Criminal Law, Art. 197; *Train*, (1862) 9 Cox 180; *Ward*, (1836) 4 Ad. & El. 384.
13 2 Russell, 1694.

long standing[1] But a long possession or enjoyment of what is said to be a

ure Code and making the question a proper one for civil Court[2]

Liability of a master for the acts of his servants.—Under English law the criminal liability of a master for the acts of his servants in cases of public nuisance is an exception

guilty The owner of wo

indicted for a public nu

works, though done by

orders[3] The Calcutta High Court has differed from this view Where the proprietors and the manager of a mill were prosecuted on a complaint that the working of the mill was a nuisance, and it appeared that the proprietors were not residents in the locality and there was no allegation of abetment by them, it was held that the person liable, where the user of premises gave rise to a nuisance, was the occupier for the time being whoever he might be, and the proprietors were therefore not guilty of nuisance[4].

Liability of joint owners—A joint owner is responsible in law for nuisance caused by his property, even though he is not in actual enjoyment of the property[5].

Prosecution under the Criminal Procedure Code not a condition precedent—A prosecution under this section is not illegal on the ground that proceedings have not previously been taken under the Criminal Procedure Code[6]

Civil and criminal liability.—Nuisances punishable under the Code may be made the subject of a civil action before or without prosecution A person aggrieved by the erection of a building in a public thoroughfare, or on the waste land of a town or village is entitled to institute a suit in a civil Court for its removal instead of preferring a complaint to the Magistrate[7] A person cannot take the law into his own hands and abate nuisance contrary to the provisions of s 26 of the Indian Easements Act, 1882[8]

Statutory authority to commit nuisance.—A statute may authorize and legalize acts which would otherwise amount to a nuisance[9]

Situation—If a party set up a noxious trade, remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads[10] But this case has been doubted in a later decision[11].

Statutory application.—Act for Removal of Nuisances below highwater-mark (XI of 1853), Sanitary Regulation Act (Bom Act VI of 1867), ss 3, 5, 6

1 *Weld* v *Hornby*, (1806) 7 East 195, 199, *Municipal Commissioners of the Suburbs of Calcutta* v *Mahomed Ali*, (1871) 7 Beng L. R 499, *Shotts Iron Co* v *Inglis*, (1882) 7 App Cas 518 523, *Attorney General* v *Richmond*, (1833) L. R 2 Fq 306 311, *Tipping* v *St Helen's Smelting Co*, (1864) L. R 1 Ch 66 69, *Cross* (1812) 3 Camp. 224

2 *Preonath Dey* v *Gobordhone Malo*, (1897) 25 Cal 278

3 *Stephens*, (1866) L. R 1 Q B 702, *Medley*, (1834) 6 C & P 292

4 *Bibhuti Bhusan Biswas* v *Bhuban Ram*, (1918) 36 Cal 515, 22 C W N 1062, 29 C. L. J 262.

5 *Molappa Goundan*, (1928) 52 Mad. 79, 80

6 *Sukkal*, (1869) Unrep Cr C 23

7 *Jina Panchhod* v *Jodha Ghella*, (1863) 1 B H C 1

8 *Zipru*, (1927) 29 Bom L. R. 484, 9 Bom Cr C 59

9 *Hammersmith, etc*, *Ry* v *Brand*, (1868) L. R 4 H L 171, *London and Brighton Rail*

and 8; the Burma Water Hyacinth Act (Burma Act I of 1917), s. 3. The definition of 'public nuisance' applies to all Acts of the Governor-General in Council and Regulations under 33 Vic., c. 3, s. 1, made after 14th January 1887[1].

English cases.—The following acts are held to be public nuisance.—Allowing a house near a highway to be ruinous and dangerous to the public[2]; keeping swine in the city[3]; making a great noise at night with a speaking trumpet[4]; collecting a number of persons for pigeon shooting[5]; indecent exposure in an omnibus[6], or on the roof of a house[7], or in a public urinal[8], or in a place where the public go[9]; negligently blasting stone in a quarry so as to endanger the safety of persons living in the vicinity[10]; exhibiting by an herbalist of a picture of a man naked to his waist and covered with sore[11]; keeping a brothel or a bawdy-house[12]; naked bathing near a public footpath[13]; keeping a booth in a public place for the purpose of showing an indecent exhibition[14]; exposing the naked dead body of a child on a public highway so as to shock and disgust passers-by[15]; burning of a dead body in such a place and in such a manner as to annoy persons passing along public roads or other places where they have a right to go[16].

PRACTICE.

As to conditional orders by a Magistrate for the removal of nuisances, see ss. 133 to 143 of the Code of Criminal Procedure; and as to a Magistrate's powers of issuing orders in urgent cases where speedy remedy is desirable, see s. 144 of the same Code. The fact that no proceedings were taken under the Criminal Procedure Code cannot be pleaded as a bar to a prosecution under this section[17].

Punishment.—The definition of public nuisance given in this section is material with reference to s. 290, which provides a punishment for the offence of committing a public nuisance in any case not otherwise punishable by the Code.

Negligent act likely to spread infection of disease dangerous to life.

269. Whoever unlawfully or negligently does any act[1] which is, and which he knows or has reason to believe[2] to be, likely to spread the infection of any disease dangerous to life[3], shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

If a man is attacked by a contagious and deadly disease and needlessly goes abroad with it in the public way, or if a person carried out a child so infected, he does what he may be supposed to know to be likely to spread the infection. And unless some lawful occasion or reason for this conduct can be shewn, as that the sick person had been directed to be removed to a hospital, and that the removal was performed with due caution, the act will be an offence punishable under this section[18].

1 General Clauses Act, (X of 1897), ss. 3 (44), 4 (2).
2 *Watts*, (1704) 1 Salk. 356.
3 *Wigg*, (1706) 2 Raym. 1163, 2 Salk. 460.
4 *Smith*, (1726) 2 Stran. 704.
5 *Charles Moore*, (1832) 3 B. & Ad. 184.
6 *Charles Holmes*, (1853) Dears. Cr. C. 207.
7 *Thallman*, (1863) 9 Cox 388.
8 *Harris*, (1871) L. R. 1 C. C. R. 282.
9 *Wellard*, (1884) 14 Q. B. D. 63.
10 *Mutters*, (1864) 34 L. J. (M. C.) 22.
11 *Grey*, (1864) 4 F. & G. 73.
12 *Rice*, (1866) L. R. 1 C. C. R. 21; *Singleton* v. *Ellison*, [1895] 1 Q. B. 607.
13 *Reed*, (1871) 12 Cox 1; *Cruden*, (1809) 2 Camp. 89, 11 R. R. 671.
14 *Saunders*, (1875) 1 Q. B. D. 15.
15 *Jane Clark*, (1883) 15 Cox 171.
16 *Price*, (1884) 12 Q. B. D. 247.
17 *Suklal*, (1869) Unrep. Cr. C. 23.
18 M. & M. 205.

1. **'Does any act'.**—See ss 32 and 33, *supra*, as to the meaning of 'act'

2. **'Reason to believe'.**—See s 26, *supra* It must be shewn that the accused had knowledge that the disease was infectious Where the disease is generally known to be infectious there will be no difficulty

3. **'Likely to spread the infection of any disease dangerous to life'.**—The infection which is likely to be spread must be of a disease dangerous to life

Syphilis.—A prostitute, who was suffering from syphilis, encouraged and permitted a man, whom she had assured that she was healthy, to have sexual intercourse with her, and thus communicated the disease to him was not liable to punishment under this section but under s 417 or 420 West, J, said "Assuming that there was dangerous disease and culpable negligence still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person and himself generally an accomplice"[1] This decision does not seem to be sound as the complainant cannot be deemed to be an accomplice, he being unaware of the disease Communication of syphilis to him amounts to spreading the infection under this section

Small-pox—Where a mother refused to allow her daughter suffering from small pox to be removed to a hospital in accordance with an order made by the District Magistrate unless she accompanied her, it was held that she had committed no unlawful or negligent act within the meaning of this section To keep one's child suffering [illegible] the removal to hospital, where [illegible] rders are kept in that house, is [illegible] as held similarly where a person disobeyed the order of the Health Officer of the Madras Corporation under s 366 of the Madras Municipality Act to remove his son, who was suffering from small pox, to an isolation hospital, but he removed him to an isolated house[3] But in England it is an offence to carry a child suffering from small pox through public street in which persons are passing[4]

Cholera—Where K, knowing he was suffering from cholera, travelled by a train, without informing the railway officers of his condition and M, knowing K's condition, purchased his ticket and travelled with him, it was held that K was properly convicted under this section, because he must have known that he was doing an act likely to spread infection, and he did so negligently, in not informing the railway authorities, and that M was guilty of abetment of K's offence[5]

Plague.—The accused resided in a plague stricken house in the Umballa Cantonment and had been in contact with a plague patient He was taken to the plague shed in company with the patient, who died there The next day the [illegible] g town [illegible] of this [illegible] likely [illegible]

[illegible] al or negligent Act On [illegible] ter inoculation, with the [illegible] or a third person may be [illegible] ll pox may be practised [illegible] ds as not to endanger the [illegible]

[1] *Rakma* (1886) 11 Bom 59, 61 Mayne doubts the reasoning of this ruling

[2] *Cahoon v Mathews* (1897) 24 Cal 494

[3] *Kandaswami Mudaliar*, (1910) 26 M. L. T 386

[4] *Vantandillo* (1815) 4 M & M. 73, *Burnett*, (1815) 4 M & S. 272

[5] [illegible]

[6] *Burnett*, su [illegible]

Glanders.—Bringing a horse infected with glanders into a public place to the danger of infecting other people is an offence[1].

PRACTICE.

Evidence.—Prove (1) that the disease in question is (*a*) infectious; and (*b*) dangerous to life.

(2) That the accused did an act which was likely to spread infection thereof.

(3) That such act was unlawful or negligent[2].

(4) That the accused knew, or had reason to believe, that such act of his was likely to spread the infection of such disease[3].

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Malignant act likely to spread infection of disease dangerous to life.

270. Whoever malignantly[1] doesa ny act[2] which is, and which he knows or has reason to believe[3] to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravation of that which is punished by the preceding section. In the last section the act is done either 'unlawfully' or 'negligently', under this, 'malignantly'. Malice aggravates the offence.

The Law Commissioners observe: "If any person died of the plague and his death could be traced to infection so caused maliciously, the person who caused it, we apprehend, would be chargeable with homicide...It is contrary to the principle of the Code to punish acts which the doer when he committed them knew to be likely to cause certain evil results, if in fact such results were not produced, in the same manner as if such evil consequences had actually flowed from them"[4]. This section is intended to meet those cases in which the malignant act is not the cause of death, but death could be traced to it.

1. **'Malignantly'.**—See s. 153, *supra*. The word 'malignantly' denotes a deliberate intention on the part of the accused. It is nowhere defined in the Code but it is used in the sense of 'maliciously'. And the word "malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse"[5].

2. **'Does any act'.**—See ss. 32 and 33, *supra*.

3. **'Reason to believe'.**—See s. 26, *supra*.

PRACTICE.

Evidence.—Prove points (1), (2) and (4) as in s. 269; and

(3) That the accused acted malignantly.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

1 *Thomas Henson*, (1852) Dears. 24.

2 See *Kandaswami Mudaliar*, (1919) 26 M. L. T. 386.

3 *Potina Padmanabhaswami*, (1891) 1 Weir 226.

4 2nd Rep., s. 226.

5 Per Bayley, J., in *Bromage* v. *Prosser*, (1825) 4 B. & C. 247, 255.

271 Whoever knowingly disobeys any rule made and promulgated[1] by the Government of India[2], or by any Government[3], for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Disobedience to quarantine rule

COMMENT

The motive for disobeying any rule is quite immaterial under this section The disobedience is punishable whether any injurious consequence flows from it or not.

Any breach of a quarantine rule is punishable under this section[1]

1. **'Any rule made and promulgated'** —The Indian Ports Act[2] authorizes the making of rules in ordinary cases For outbreaks of plague, the Epidemic Diseases Act[3] is passed

2. **'Government of India'.**—See s 16, *supra*

3. **'Any Government'** —See s 17, *supra*

Statutory application —Sanitary Regulation Act (Bom Act VI of 1867), ss 11, 14.

PRACTICE.

Evidence —Prove (1) the existence of the rule of quarantine

(2) That such rule was made and promulgated by Government

(3) That the accused knew of such rule

(4) That he disobeyed it knowingly

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency or first or second class—Triable summarily

272 Whoever adulterates[1] any article of food or drink[2], so as to make such article noxious as food or drink[3], intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Adulteration of food or drink intended for sale.

COMMENT.

The mixing of noxious ingredients in food or drink, or otherwise rendering it unwholesome by adulteration is punishable under this section Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under it, e g , mixing water with milk[4]

1 Bom Act VI of 1867, s 11

2 Act III of 1901 repealing the Indian Quarantine Act (I of 1870)

3 Act III of 1897.

4 *Abdul Rahman* (1900) 1 L. R. F 153.

1. **'Adulterates'.**—The word 'adulterates' means mixes with any other substance, whether wholly different, or of the same kind but of inferior quality.

2. **'Any article of food or drink'.**—According to the plain meaning of the section the articles of food or drink may be for human consumption, or for the use of animals.

3. **'Noxious as food or drink'.**—The word 'noxious' means injurious to health, e.g., paddy soaked in dirty water[1]; or toddy in which germs have germinated[2]; or bread mixed with alum[3]. It is not an offence to sell inferior food cheap. if it is not shewn to be noxious[4]. A person who mixes pig's fat with *ghi*, intending to sell the mixture as food or knowing it to be likely that it will be sold as such does not commit an offence under this section. "It is true that the mixing of pig's fat with ghi and selling the mixture would be noxious to the religious and social feelings of both Hindus and Muhammadans; but I am of opinion that such an act would not come within the meaning of the expression 'noxious as food' which occurs in section 272 of the Indian Penal Code. That expression obviously means unwholesome as food or injurious to health and not repugnant to one's feelings. The word 'noxious', had it stood by itself, might have had a wider meaning, but what I have to consider is the expression 'noxious as food' and not merely 'noxious'"[5].

Similarly, if a person exposes for sale milk adulterated with water he does not commit an offence under this section because the mixture is not noxious or injurious as food or drink[6].

Adulteration statutes.—Recently several statutes are passed for preventing the adulteration of food. See the Bengal Food Adulteration Act (Beng. Act VI of 1919); the Punjab Adulteration of Food Act (Punj. Act VI of 1919); the Central Provinces Prevention of Adulteration Act (C. P. Act II of 1919); the Behar and Orissa Food Adulteration Act (Behar Act II of 1919); the Bombay Prevention of Adulteration Act (Bom. Act V of 1925); 18 & 19 Geo. V., c. 31.

PRACTICE.

Evidence.—Prove (1) that the article in question is food or drink.

(2) That the accused adulterated it.

(3) That such adulteration rendered it noxious if taken as food or drink.

(4) That the accused, at the time of such adulteration, intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summarily triable.

Order for destruction.—On a conviction under this section the Court may order the food or drink to be destroyed[7].

Sale of noxious food or drink.

273. Whoever sells or offers or exposes for sale, as food or drink, any article[1] which has been rendered or has become noxious, or is in a state unfit for food or drink[2], knowing or having reason to believe that the same is noxious as food or drink[3], shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

1 *Cunnyappa*, (1887) 1 Weir 227.
2 *Ediga Narasappa*, (1894) 1 Weir 228.
3 *John Dixon*, (1814) 3 M & S. 11.
4 *Gunesha*, (1873) P. R. No. 15 of 1873.
5 Per Sulaiman, J., in *Ram Dayal*, (1923) 46 All. 94.
6 *Dhaua*, (1924) 1 Lah. C. 273.
7 Criminal Procedure Code, s. 521.

COMMENT.

Section 272 deals with adulteration of food or drink, this section, with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink This section is more comprehensive in its provisions, and includes any article of food which has gone bad by being kept two long, or which never was at any time fit for food, or drink which has gone bad by exposure or by length of time it has been bottled, etc For instance, the selling of toddy in which germs are germinated is an offence under it[1]

Scope.—This section is not expressly limited to food intended for human consumption But as it comes in the Chapter dealing with offences relating to public health, etc , it seems it is not intended to include food or drink for animals The words "the public" mean human beings in general and do not include animals According to Webster, 'public' means the general body of mankind or of a nation, state, or community ' Thus this section does not make the sale of horse's food of grain, or fodder, unfit for a horse to eat an offence punishable under it[2]

Ingredients.—The section has the following essentials —

1 Selling or offering or exposing for sale as food or drink some article

2 Such article must have become noxious or must be in a state unfit for food or drink

3 The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink

1. 'Sells or offers or exposes for sale as food or drink any article'—The article of food should have been exposed for sale Where a butcher had killed and hung up a sheep, and on inspection the flesh was found unfit for food but it was not removed to the shop nor exposed or offered for sale, it was held that the offence was incomplete and a conviction could not be sustained[3]

'As food or drink'.—The mere sale of an article not itself an article of food even though it be sold wi [illegible]
intention to mix it with [illegible]
is to be composed will b [illegible]
the respondent a packet c [illegible]
of soda, 40 per cent of ground rice, and 40 per cent of alum, the latter of which ingredients is injurious to health It was held that such baking powder was not an article of food and that the sale of it was not an offence[4]

What is punishable under this section is the sale or offer or exposure for sale of noxious articles as food or drink and not the mere sale or offer or exposure for sale of noxious articles Where, as a matter of trade, the owner of a grain pit sold the contents of the pit before it was opened at a certain sum per maund [illegible] as found that [illegible] was held that [illegible]

2. 'Which has been rendered or has become noxious or is in a state unfit for food or drink'.—The word 'noxious' means harmful or injurious to health or unwholesome[6] It must be shown that the accused sold or exposed for sale an article which was to his knowledge noxious as food or drink. The accused was convicted for exposing for sale some *ghi* which was bad The *ghi* was not adulterated but somewhat rancid The High Court quashed the conviction on the ground that it was not shewn that the *ghi* was noxious as food or drink to the

1 *Elliga Narasappa,* (1894) 1 Weir 228
2 *Sita Ram,* (1907) P L R No 139 of 1908
3 *Mudar Sahib* (1884) 1 Weir 227 See *Barlow v Terrett,* [1891] 2 Q B 107
4 *James v Jones* [1894] 1 Q B 304
5 *Salig Ram,* (1906) 28 All 312
6 *Chokray Marwari,* (1908) 12 C W N 604

knowledge or belief of the accused[1]. Milk is not rendered noxious by being mixed with water[2]. Nor is, *ghi*, when adulterated with vegetable oil[3]. It is not an offence to sell inferior food cheap, if it is not shown to be noxious. Where a person sold an inferior quality of flour after reducing its price and the purchaser was aware of the fact, it was held that he was not guilty under this section[4]. Similarly, selling wheat containing a large admixture of extraneous matter. e.g., dirt, wood, matches, charcoal, black-seeds, etc., is held to be no offence[5].

A grocer on being asked for two pots of cream sold two pots of cream labelled "Rich cream. This cream contains a small percentage of boron preservative to retard sourness". No indication beyond the label was given to the purchaser as to the composition of the cream, which, on analysis, was found to contain boracic acid. In the trade there were two kinds of cream known and sold, preserved cream, and cream, and the boracic acid was generally used by the trade as a preservative to keep the cream good. It was found as a fact that cream if mixed with boracic acid equivalent to that found in the cream sold was not injurious to adults, but was injurious to the health of children and invalids, and that this class of cream was given to children. It was held that the preserved cream so sold was not itself an "article of food". but was an article of food—namely, cream—mixed with an ingredient; that the article so mixed was "injurious to health" within the meaning of s. 3 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vic., c. 93), although it was not injurious to normal adult persons, and that the seller was guilty of selling an article of food mixed with an ingredient so as to render the article injurious to health[6].

'Unfit for food or drink'.—According to the plain wording of the section the articles of food or drink may be for human consumption, or for the use of animals. But if the food in question is unfit for men, but fit for animals, and is sold as food for animals, no conviction will lie[7].

3. 'Knowing or having reason to believe that the same is noxious'.—See s. 26 as to the meaning of the expression 'reason to believe'. A meat salesman can be convicted for knowingly selling or exposing meat for sale in a public market as fit for human food, when it is not[8].

Selling adulterated article as unadulterated.—The sale of adulterated articles of food as pure and unadulterated is not an offence under this section though it may amount to cheating or to an offence under some Municipal Act[9].

Statutory application.—The City of Bombay Municipal Act (Bom. Act III of 1888), s. 417B; the Bombay City Municipalities Act (Bom. Act XVIII of 1925), s. 176 (1) (*b*).

PRACTICE.

Evidence.—Prove (1) that the article is food or drink.

(2) That the accused sold, or offered, or exposed for sale such article.

(3) That at the time it was sold, etc., it had been rendered, or had become noxious, or was in a state unfit for food or drink.

(4) That he at the time knew, or had reason to believe, that the article sold etc., was noxious, or unfit for food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

1 *Sheo Lal*, (1904) 26 All. 387.
2 *Chinniah*, (1887) 1 Weir 228.
3 *Chokraj Marwari*, (1908) 12 C. W. N. 608.
4 *Gunesha*, (1873) P. R. No. 15 of 1873.
5 *Narumal Jawarmal*, (1904) 6 Bom. L. R. 520.
6 *Cullen* v. *McNair*, (1908) 21 Cox 682; *Haigh* v. *Aerated Bread Co.*, (1916) 25 Cox 378.
7 *Crowley*. (1862) 3 F. & F. 109.
8 *Stevenson*, (1862) 3 F. & F. 106.
9 Vide *Baishtab Charan Das* v. *Upendra Nath Marti*, (1898) 3 C. W. N. 66.

Order for destruction —On a conviction the Court may order the food or drink to be destroyed[1].

274 Whoever adulterates[1] any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Adulteration of drug

COMMENT.

To preserve the purity of drugs sold for medicinal purposes this section is enacted

To support a conviction under this and the following section it is sufficient to show that the efficacy of a drug is lessened it need not necessarily become noxious to life Under both these sections mixing water with a drug would be penal but where a drug loses its efficacy by its being kept the sections do not apply A person cannot be convicted who sells an inferior quality of a drug because the word 'adulteration' imports an admixture of some foreign substance

1. **'Adulterates'**.— Adulterates, that is apparently mixes with any other substance, whether wholly different, or of the same kind but inferior quality [illegible] cod liver oil with a superior [illegible] though the efficacy of the

PRACTICE.

Evidence —Prove (1) that the article is a drug or medical preparation

(2) That it was adulterated by the accused

(3) That such adulteration tended to lessen its efficacy, or to change its operation or to make it noxious

(4) That the accused intended that such adulterated drug should be sold or used for a medicinal purpose as an unadulterated drug, or knew that it was likely that it would be sold or used as for the same

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily

Order for destruction —On a conviction the Court may order the drug or medical preparation to be destroyed[1]

275 Whoever knowing any drug or medical preparation to have been adulterated[1] in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells[2] the same, or offers or exposes[3] it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adul-

Sale of adulterated drugs

[1] Criminal Procedure Code

teration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The offence under this section consists in selling, or offering, or exposing for sale, or issuing from any dispensary, an adulterated drug as unadulterated. This section bears the same relation to s. 274 as s. 273 bears to s. 272. Section 273 deals with the sale of an article of food or drink that has become noxious. This section not only prohibits its sale but also its issue from any dispensary.

1. **'Knowing any drug or medical preparation to have been adulterated, etc.'**—There must be knowledge that the drug or medical preparation has been adulterated in such a manner as to lessen its efficacy or to change its operation or to render it noxious. Upon a complaint, under s. 6 of the Food and Drugs Act, 1875 (38 & 39 Vic., c. 93) for selling tincture of opium which was not "of the nature, substance, or quality of the article demanded by the purchaser," it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient in opium to the extent of one-third and in alcohol to the extent of nearly one-half as compared with the standard prescribed by the British Pharmacopœia. It was held that the defendant was liable to be convicted[1]. Similarly, it was held where a purchaser asked to be supplied with "mercury ointment", was given an ointment containing a less proportion of mercury than that prescribed by the Pharmacopœia[2].

2. **'Sells'.**—He who sells, whether he be a master or servant, whether he be principal or a person to whom the conduct and management of sales is delegated, is struck at by this section[3]. But a mere canvasser who gets only commission for receiving orders is not a seller[4].

3. **'Exposes'.**—The drug sold may be in a packet: it is not necessary that it must be actually exposed to view. It is sufficient exposure of the article if the packet containing it is in the shop for sale[5]. There is no exposure for sale if the drug is simply stored up in a room or cellar[6].

PRACTICE.

Evidence.—Prove (1) that the drug has been adulterated.

(2) That the adulteration was such as to lessen its efficacy, or change its operation, or render it noxious.

(3) That the accused sold, or offered, or exposed such drug for sale; or that he issued it from a medical dispensary; or that he caused it to be used for a medical purpose.

(4) That he sold, or issued such drug as an unadulterated drug; or caused it to be used by a person who did not know of such adulteration.

(5) That he knew that such drug was so adulterated when so sold, etc.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the destruction of the drug[7].

1 *White* v. *Bywater*, (1887) 19 Q. B. D. 582.
2 *Dickins* v. *Randerson*, [1901] 1 K.B. 437.
3 *Pharmaceutical Society* v. *London and Provincial Supply Association*, (1880) 5 App. Cas. 857; *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181.
4 *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601.
5 *Wheat* v *Brown*, [1892] 1 Q. B. 418.
6 *Crane* v. *Lawrence*, (1890) 25 Q. B. D. 152.
7 Criminal Procedure Code, s. 521.

276 Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Sale of drug as a different drug or preparation.

COMMENT.

The offence constituted by this section does not involve the idea of any adulteration, or inferiority, in the substituted medicine It is sufficient that it is not in fact what it purports to be for instance, supplying savin instead of saffron[1] If a chemist were to discover a drug which he considered to be just as effective as genuine and which could be procured for half the price, he would not be justified in selling it as genuine even though it answered precisely the same purpose The fraud consists not in the injury done but in the false pretence by which persons who suppose that they are using one medicine are forced to use another against their will

The difference between this and the two preceding sections is that no adulteration is contemplated or essential for a conviction under this section while under the former it is

This section deals with drugs only and not with articles of food or drink

PRACTICE.

Evidence —Prove (1) that the accused sold or offered, or exposed for sale or issued from a dispensary for medicinal purposes the drug or medical preparation

(2) That it was so sold etc , by him as a drug or medical preparation different from what it is

(3) That he knew of such difference at the time it was so sold etc

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency or first or second class—Triable summarily

277 Whoever voluntarily corrupts or fouls[1] the water of any public spring or reservoir[2], so as to render it less fit for the purpose for which it is ordinarily used[3], shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both

Fouling water of public spring or reservoir

COMMENT

The water of a public spring or reservoir belongs to every member of the public in common and, if a person voluntarily fouls it he commits a public nuisance

Ingredients —The section requires (1) voluntary corruption or fouling of water, (2) the water must be of a public spring or reservoir, and (3) the water must be rendered less fit for the purpose for which it is ordinarily used

1. 'Voluntarily corrupts or fouls'.—See s 39 *supra* The purpose for which the water is ordinarily used must be considered in determining whether there has been a voluntary corrupting within the meaning of this section

[1] *Knight v Bowers* (1885) 14 Q B D

'Corrupts or fouls'.—The words "corrupts or fouls' mean some act which physically defiles or fouls the water[1]. *Bathing in a tank*[2] *or spitting into a public well*[3] fouls drinking water. But angling with an unfoul bait does not[4]. Fishing with basket-nets in a tank, the water of which was used for drinking purposes, the use of the baskets having caused a slight disturbance of the mud and so rendered the water rather less fit than usual for drinking[5]; and cultivating paddy in the bed of a tank, the water of which was used as of right by the public for drinking purposes[6], were held to be offences under this section. The act of a woman of a lower caste taking water from public cisterns of water does not amount to corrupting or fouling[7]. Similarly, a person of a low caste drawing water from a public well cannot be said to currupt or foul the well[8].

2. **'Public spring or reservoir'.**—These words do not include a public river[9]. The word 'public' is nowhere defined. But a 'public place' is a place where the public go, no matter whether they have a right to go or not[10]. Similarly a public spring will be a spring used by the public whether rightly or not. The strewing of branches in a river for fishing purposes was held, therefore, to be no offence under this section[11]. The words 'public spring' do not include a continuous stream of water running along the bed of a river[12]; nor the water of a rivulet standing in pools from which water is drawn for drinking purposes[13]; nor the water *of a nullah*[14]. *Where a dog-killer buried the carcass of a dog in the bed of a public* river near a town, it was held that a conviction under this section could not be sustained, although there was evidence that the people of the vicinity bathed in, and drank water from, the river and also used for domestic purposes water taken from the river in the bed of which the carcass was buried, because the section applied to corrupting the water of a spring or reservoir[15].

In an indictment against a gas company for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish were destroyed, and the water was rendered unfit for drinking, etc., it was held that the circumstance that by the diminution of fish, a considerable number of fishermen were thrown out of employ was not of itself sufficient ground to sustain such indictment[16].

3. **'So as to render it less fit, etc.'**—The water must have been rendered less fit for the purposes for which it is ordinarily used.

Statutory application.—A violation of ss. 388 (*a*) (*b*), (*c*) and (*d*), 389 and *173 of the* City of Bombay Municipal Act[17] falls under this section.

PRACTICE.

Evidence.—Prove (1) that the spring or reservoir is public.

(2) That the accused caused the water thereof to become corrupt or foul.

(3) That the did so voluntarily.

(4) That such corrupting or fouling rendered the same less fit for use than *it ordinarily* was before the accused did as above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

1 *Bhagi*, (1900) 2 Bom. L. R. 1078; *Pandia Mahar*, (1900) 13 C. P. L. R. 92.

2 *Muthian*, (1897) 1 Weir 229. See, however, (1878) 1 Weir 228.

3 *Ramkaranlal*, (1916) 13 N. L. R. 68.

4 *Srinivasa Naik*, (1881) 1 Weir 231.

5 *Punni Besoyi*, (1881) 1 Weir 231.

6 *Ramatripati*, (1881) 1 Weir 229.

7 *Bhagi*, sup.

8 *Pandia Mahar*, sup.

9 *Nama Rama*, (1904) 6 Bom. L. R. 52.

10 *Wellard*, (1884) 14 Q. B. D. 63, 66.

11 *Halodhur Poroe*, (1877) 2 Cal. 383; see also *Patha*, (1868) Cr. R. July 1869, Unrep. Cr. C. 14.

12 *Vitti Chokkhan*, (1881) 4 Mad. 229; *Anthony*, (1884) 1 Weir 230.

13 *Hari*, (1885) Cr. R. Sept. 1885, Unrep. Cr. C. 215.

14 *Nilappa Dayappa*, (1898) Unrep. Cr. C. 963.

15 *Anthony*, (1884) 1 Weir 230.

16 *Medley*, (1894) 6 C. & P. 292.

17 Bom. Act. III of 1888.

Making atmosphere noxious to health

278 Whoever voluntarily vitiates the atmosphere[1] in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees

COMMENT

Prosecutions against offensive trades which give out bad smells will come under this section As the contamination of atmosphere affects the people living in the neighbourhood, this section is not so general as the last one which deals with the fouling of the water of a stream or reservoir This section and s 336 provide punishment for similar acts causing danger to human life and personal safety It is not essential under either of them that hurt be actually caused

Scope.—The section is directed against a public nuisance and not a private nuisance Where the accused threw a human skull which was in a highly offensive condition into the house of the complainant, but there was nothing to show that the atmosphere was made noxious to the other persons dwelling in the locality it was held that he was not guilty of an offence under this section though his conduct was most reprehensible and offensive[1]

1. 'Voluntarily vitiates the atmosphere'.—See s 39 *supra* as to the meaning of the word 'voluntarily The act done must be noxious to the health of persons in general dwelling or carrying on business in the neighbourhood It is not necessary that the alleged nuisance should produce smells injurious to health, it is sufficient if they be offensive to the senses Thus, allowing a large stock of bones to remain uncovered in the open for a long time so as to become rotten and to emit a smell noxious to people living in or passing by the vicinity is a public nuisance[2]

Offices of nature.—The act of performing the offices of nature in a public street is not an offence under this section[3] No reasons are given for this decision, but it seems that a mere solitary act like this is not likely to vitiate the atmosphere

English cases—Making acid spirit of sulphur, and thereby impregnating the air with offensive smells[4], and steeping hides near a highway[5], are held to be public nuisances

PRACTICE.

Evidence.—Prove (1) that the accused caused the atmosphere to be vitiated

(2) That he did so voluntarily

(3) That such vitiation was in its nature noxious to health

(4) That it was noxious to the health of persons dwelling or carrying on business in the neighbourhood of the place, or passing along a public way

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial

Rash driving or riding on a public way.

279. Whoever drives any vehicle, or rides, on any public way[1] in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person[2], shall be

1 *Rahim Mian* (1928) 10 P L T 87
2 *Berckefelt*, (1906) 34 Cal 73
3 *Mahadshet Appushet*, (1884) Cr R 1884 Unrep Cr C 200.
4 *White* (1757) 1 Burr 333.
5 *, * (1728) 2 Stran 1167.

punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Under this section the effect of driving or riding must be either that human life was in fact endangered or that hurt or injury was likely to be caused.

Ingredients.—The section requires two essentials—

1. Driving of a vehicle, or riding on a public way.
2. Such *driving or riding must be so rash or negligent as to endanger* human life or to be likely to cause hurt or injury to any other person.

1. 'Drives any vehicle, or rides, on any public way'.—"If a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage...If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood"[1]. If a man drives at an unusually rapid pace he will be liable for injury caused thereby, although he calls out to the person injured to get out of the way in time. The fact that streets are unusually crowded for any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accident ensuing from driving at a rate, and with those precautions which he might have ordinarily observed[2].

A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road[3]. He must satisfy the Court that he was not rash or negligent in driving on the wrong side[4]. In cases of negligent driving, the law or usage of the road is not the criterion of negligence. Therefore, where defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side plaintiff sustained damages, it was held that it was for the jury to decide the question of negligence, without regard to the law of the road[5]. Drivers of motor cars should not attempt to pass a car in front of them by going on to the wrong side of the road unless they can see the road in front is so absolutely clear of traffic coming from the opposite direction that they can get back again on to the proper side of the road without any *risk of accident. It is only* when *the road is so clear that* there can be no possible chance of an accident that any attempt may be made to pass the car in front of the driver[6]. Where the accused, while driving a motor-car on the wrong side of the road at a blind corner between two roads of considerable traffic, came in collision with a motor bicycle and caused damage to the side car of the bicycle, it was held that he was guilty of an offence under this section[7].

[1] Per Lord Esher, M. R., in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497.

[2] *William Murray*, (1852) 5 Cox 509.

[3] *Pluckwell* v. *Wilson*, (1832) 5 C. & P. 375.

[4] *Babu Santu Jadav*, (1920) 23 Bom. L. R. 358, 6 Bom. Cr. C. 55.

[5] *Wayde* v. *Lady Carr*, (1823) 2 Dow. & Ry. 255, followed in *Davar*, (1911) 13 Bom. L. R. 126, 1 Bom. Cr. C. 9, where a conviction under s. 2 of the Bombay Motor Vehicles Act (II of 1904), s. 2, was set aside. In Madras there is a special rule passed under the Motor Vehicles Act prohibiting a car to be driven on the wrong side of the road: *Rathnam*, [1912] M. W. N. 539.

[6] *Babu Santu Jadav*, sup.

[7] *Yar Mahomed*, (1921) 26 Cr. L. J. 253. See *Charan Singh*, (1925) 23 A. L. J. 790.

A person driving a car must keep it in a state of control sufficient to enable him to avoid running into any passenger who may fail to step off the road[1]

trap, off which trap orse proceeded throu to stop the vehicle, but failed to do so It was held that the accused was the driver of the vehicle, though asleep, and was guilty of driving a carriage at a furious pace so as to endanger the life or limb of a passenger who in this case was the constable on duty[2]

Driving bullocks without nose-strings.—A person driving a cart, the bullocks of which have no nose strings, is not guilty of rash driving under this section[3]

exercising expected fast that he would be liable, provided the foot passenger acted in a reasonable manner[4]

'Public way.'—Any way which is common to all subjects whether directly leading to a town, or beyond, a town as a thoroughfare to other towns or from town to town, may properly be called a public way[5] There must be a definite enduring trackway in some particular direction Merely temporary and transitory tracks not passable in all seasons cannot be regarded as public ways[6]

2. 'So rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person' —"A rash act is primarily an over hasty act and is thus opposed to a deliberate act, but it also includes an act which though it may be said to be deliberate, is yet done without due deliberation and caution"[7] The most formally scientific analysis of negligence is that of Austin He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, "are broadly distinguished by differences

In cases of 'negligence', the party performs not an act to which he is obliged he breaks a positive duty

In cases of 'heedlessness' or 'rashness' the party does an act which he is bound to forbear, he breaks a negative duty

In cases of 'negligence', he adverts not to the act, which it is his duty to do

In cases of 'heedlessness', he adverts not to consequences of the act he does

In cases of 'rashness' he adverts to those consequences of the act but by reason of some assumption which he examines insufficiently, he concludes that those consequences will not follow the act in the instance before him (p 441)

'Negligence' has been defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing some-

l, it is the rson to bring

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and

1 *Kanshi* (1926) 28 P L R 99

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Cr

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5 Russell 761, *Campbell* v *Lang*, (1853) 1 Macq 451

6 *Schwinge* v *Dowell*, (1862) 2 F & F 845, *Chapman* v *Cripps* (1862) 2 F & F 864

7 Per Hosking J C, in *Nga Myat Tha*, (1898) P J L B 426

8 *Blyth* v *Birmingham Waterworks Co*, (1856) 11 Ex 781 784

9 Per Willes, J, in *Grill* v *General Iron Screw Collier Co*, (1866) 35 L J C P 321, 330

often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. *Culpable negligence* is acting without the consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection[1].

An injury shall be deemed to be negligently caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of such act; or when it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omittng to do any act which a person using reasonable caution would not have omitted to do[2]. When 'negligently' is a part of the definition of an offence, it implies that the act constituting the offence shall have been done, or caused, by the alleged offender himself, proof that it was done by the alleged offender's servant, without more, will not bring the charge home[3].

Criminal negligence or criminal rashness is an important element in offences punishable under ss. 279, 280, 283-289, 304A, 336-383.

'Endanger human life'.—It is not necessary that the rash or negligent act should result in injury to life or property[4]. It is not necessary to prove that any person was on the road, at the time, and the Court may take into consideration the probability of persons using it being placed in danger[5]. The mere fact, therefore, that a public road happens, at the moment, to be empty is not *per se* a ground for acquitting a person of the offence under this section, for his rash driving or riding in such public road is likely to cause injury to human life, even though in point of fact he had, by the intervention of Providence, not endangered the safety of any person[6]. Supposing that a person driving a vehicle in a crowded thoroughfare urges the horses to such speed that it is impossible for him to stop their course suddenly, and that a passenger is knocked down by them and killed on the spot, the driver would be found guilty of culpable homicide. Now if the passenger was just saved by the timely effort of another person pulling him out of the way, would not a want of due regard for human life on the part of the driver be, as justly inferred from the manner of his driving, proved as we may assume by the evidence of those two persons, the one who had been in imminent peril of his life and the other who happily saved him, as if the result had been a fatal accident? The want of due regard for human life upon which the criminality depends is a matter of inference from the circumstances, and wherever the circumstances proved are such that if loss of life had ensued the party committing the act would be answerable for it criminally, the same circumstances will sufficiently warrant a conviction of the simple offence where no injury has resulted.

There can be no civil action for negligence if the negligent act or omission has not been attended by any injury to any person, but bare negligence involving the risk of injury is punishable criminally, though nobody is actually hurt by it.

If actual hurt is caused the case would come under s. 337 or 338; and if death is caused, under s. 302 or 304A.

1 *Nidamarti Nagabhushanam*, (1872) 7 M. H. C. 119; *Ketabdi Mundul*, (1879) 4 Cal. 764.

2 10th Par. R., 16.

3 *Chisholm v. Doulton*, (1889) 22 Q. B. D. 736.

4 (1871) 6 M. H. C. App. 33; *Nabi Bakhsh*, (1910) P. W. R. (Cr.) No. 2 of 1912.

5 *Hormusji Nowroji Lord*, (1894) 19 Bom. 715.

6 *Ganesh Das*, (1910) P. W. R. (Cr.) No. 39 of 1910.

Under ss 279, 280, 282 and 284–289 the offences against public safety are completed although the rash or negligent act results in no injury to life or property

'Hurt'.—See s 319, *infra* Where a foot passenger was injured owing to the rash and neglig the driver to have him where he was, able under this section and s 337[1]

'Injury '—See s 44, *supra*

Liability of a master for the rash driving of his servant.—In case of of has his own act, there must therefore be some personal act[3]

Contributory negligence.—The doctrine of contributory negligence does not apply in criminal actions[4] The accused will be liable even though there has been a degree of negligence on the part of the prosecutor which would incapacitate him from bringing a civil suit While contributory negligence would not be a defence entitling the accused to an acquittal, it might be a factor for consideration in determining the sentence[5]

Special statute.—Where there is a special statute, such as the Bombay Motor Vehicles Act (Bom Act II of 1904), which penalises the rash driving of a motor, the punishment should be under such statute[6] The accused cannot be prosecuted under this section when once he is convicted under the Motor Vehicles Act for rash driving, but he can be prosecuted under s 338 of the Penal Code for the consequences of such rash driving[7]

PRACTICE.

Evidence.—Prove (1) that the accused was driving a vehicle or that he was riding having been run over[8]

(4) That the same was such as to endanger human life, or such as likely to cause hurt or injury

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily

Rash navigation of vessel

280. Whoever navigates any vessel[1] in a manner so rash or negligent[2] as to endanger human life[3], or to be likely to cause hurt[4] or injury[5] to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[1] *Aghan*, (1927) 4 O W N 768
[2] *Larrymore* v *Pernendoo Deo*, (1870) 14 W R (Cr) 32
[3] *Allen*, (1835) 7 C. & P. 153, *Green*, (1835) 7 C & P 156
[4] *Kew*, (1872) 12 Cox 355, *Jones*, (1870) 11 Cox 544, *Dant*, (1865) 10 Cox 102, 34 L J (M C) 119, *Longbottom*, (1849) 3 Cox 439, *Swindall*, (1846) 2 C. & K. 230, *Plenkinsop* v *Ogden*, [1898] 1 Q B. 783. See 6 M H C. App 31
[5] *Kanshi*, (1926) 28 P L R. 99
[6] *Bayne*, (1906) 8 Bom L R. 414
[7] *Gur Narain* (1927) 29 Cr L J 271.
[8] *Pillayan*, (1895) 1 Weir 232.

COMMENT.

The same rules apply to navigation on a river as on a highway, and persons who navigate a river improperly either by too much speed or by negligent conduct are as much liable as if the accident occurred on a public highway either by furious driving or negligent conduct.

This section therefore is analogous to the preceding section. Section 279, however, applies only in the case of a 'public' road, whereas this section is not limited to public navigable waters, but would also include waterways in private property.

Scope.- This section deals with the case of inland navigation. Rash or negligent navigation on the high seas will not be punished under the Code. The Indian Merchant Shipping Act[1], the Pilgrim Ships Act[2], and the Native Passengers Ships Act[3] deal with the safety of passengers on the high seas.

1. **'Vessel'.**—See s. 48, *supra.*

2. **'Rash or negligent'.**—See Comment on s. 279, *supra.* The negligence to render the defendant liable must be the *causa causans*, or proximate cause of the injury, and not merely *causa sine qua non*[4]. The immediate cause of the accident should be rashness or negligence on the part of the navigator. In considering the question of degree, the question of contributory negligence has also to be taken into account, not as a defence to the indictment, but for the purpose of determining causation and fixing a measure of the liability of the navigator. Where the navigator does some act which causes the accident, he will be guilty of the offence under this section, but a mere omission on his part in not doing the whole of his duty is not sufficient to make him guilty. Where the accused navigator did all he could to save the situation but could not avoid the collision, he was held to be not guilty[5]. It is the primary duty of stream vessels to keep out of the way of vessels lying at anchor. The fact that a launch runs into a cargo boat at anchor is in itself prima facie evidence of negligent navigation[6]. Where a ferry boat contractor was convicted under this section and s. 109 of abetting the rash navigation of a vessel, on the evidence that the boat hired by him in fulfilment of the contract was upset through not containing sufficient ballast, it was held that there was no evidence to show that the contractor intentionally omitted to provide the ferry boat with what he knew to be necessary for safe navigation, and that the conviction, therefore, could not be supported[7].

To make the captain of a steam vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission, on his part, in not doing the whole of his duty, is not sufficient. But if there be sufficient light, and the captain of a steamer is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter[8].

Where a vessel is sunk by unavoidable accident in a public navigable river whether in the usual tract of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precautions to prevent injury to other vessels by striking against them; and this obligation may be transferred with the transfer of possession and control to another person; and on the abandonment of possession and control, the obligation ceases[9].

[1] Act VII of 1880.
[2] Act XIV of 1895.
[3] Act X of 1887.
[4] *Bailiffs of Romney Marsh* v. *Trinity House*, (1870) L. R. 5 Ex. 204, 208.
[5] *Kamdar Ali Serang*, (1911) 14 C. L. J. 656.
[6] *Lal Meah*, (1911) 4 B. L. T. 140, 12 Cr. L. J. 583.
[7] *Sakaram Govind*, (1870) Cr. R. July 1870, Unrep. Cr. C. 35.
[8] *Green*, (1835) 7 C. & P. 156.
[9] *White* v. *Crisp*, (1854) 10 Ex. 312.

3. **'Endanger human life'.**—See s 279, *supra*
4. **'Hurt'.**—See s 319, *infra*
5. **'Injury'.**—See s 44, *supra*

PRACTICE.

Evidence.—Prove (1) that it was a vessel which was being navigated.

(2) That the accused was navigating the same

(3) That he was doing so in a rash or negligent manner

(4) That the same was such as to endanger human life, or such as to be likely to cause hurt or injury

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial

Exhibition of false light, mark or buoy

281. Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT

Intentional exhibition of false light, mark or buoy with a view to mislead any navigator is punishable under this section If the act is not intentional but due to negligence then this section will not apply

PRACTICE.

Evidence.—Prove (1) that the accused exhibited the light, mark or buoy in question

(2) That such light, mark or buoy was false

(3) That the accused did as in (1), intending, or knowing that such false exhibition would be likely to mislead any navigator

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, did exhibit a false light . . . .

. . . .

zance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Conveying person by water for hire in unsafe or overloaded vessel

282. Whoever knowingly[1] or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section provides against the negligence of carriers by water; whereas no specific provision is made for the negligence of carriers by land. Boatmen plying for hire on rivers, at ferries, etc., whose boats are overloaded, or are not in a fit condition safely to carry passengers, are criminally responsible for their neglect. Under this section no liability will attach to the owner if the ship sinks with her crew and the captain only; but it will afford no protection if a single passenger goes to the bottom, though he may have been carried gratuitously.

Object.—The motive for specifically providing for the case of a common carrier by water is that he exercises an employment affecting the public in general, and the probable consequences of negligence in carrying by water are much more serious than they ordinarily are in carrying by land.

1. **'Knowingly or negligently conveys or causes to be conveyed, etc.'**—The word 'knowingly' has here a significance similar to 'rashly'. Where a person with the assistance of two others plied a ferry boat, which was out of order, and had a crack, and he took in one hundred passengers, and as a consequence the boat was upset, and seven persons were drowned, it was held that he should be convicted under this section[1]. Certain persons whom the accused, a ferryman, was rowing across a river, were drowned by the sinking of the boat which was an old one, with some holes in the bottom, over which planks had been nailed. It was held that the accused was guilty under this section[2].

PRACTICE.

Evidence.—Prove (1) that the accused conveyed a person for hire, or caused the same to be done.

(2) That the mode of conveying that person was, in a vessel, by water.

(3) That such vessel at the time was in such a state, or so loaded, as to be dangerous to the life of that person.

(4) That when such person was thus conveyed, the accused acted negligently or with a knowledge of the state of such vessel.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Danger or obstruction in public way or line of navigation.

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person[1] in any public way or public line of navigation[2], shall be punished with fine which may extend to two hundred rupees.

COMMENT.

This section refers to parties who do acts so as to cause danger, obstruction or injury to any person in any public way[3], or public line of navigation.

Every man is bound to use his property as not to injure others. Holt, C. J., laid down the strict principle of law—*sic utere tuo ut alienum non lædas* (every one must so use his own as not to do damage to another). The offence punishable by this section is the nuisance of causing obstruction, etc., in a public way or navigable river or canal.

1 *Khoda Jagla*, (1864) 1 B. H. C. 137.
2 *Magenee Behara*, (1869) 11 W. R. (Cr.) 3.
3 *Bholanath Banerjee*, (1867) 7 W. R. (Cr.) 31.

Ingredients.—The section requires two essentials —

1 A person must do an act or omit to take order with any property in his possession or under his charge

2 Such act or omission must cause danger, obstruction or injury to any person in any public way or line of navigation

1. 'By doing any act, or by omitting to take order with any property in his possession, etc '—Here the word act' is contrasted with omitting' though it includes omission See s 32, *supra*

'To take order'.—That is, to dispose of the property in his possession or charge in such a way as to prevent danger, obstruction, or injury The defendant was the owner and occupier of a vacant piece of land He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a public nuisance *It was held that it was a common law duty of the owner of the piece of* and to prevent it from being so used as to be a public nuisance[1] Where obstruction was caused to a public way by the erection of a hut and not by the exposing of goods for sale in the said hut by the accused, who had rented it from the person who had raised the hut, it was held that the accused could not be convicted of an offence under this section[2]

'Property'.—See s 22, *supra*

'Possession'.—See s 27, *supra*

2 'Causes danger, obstruction or injury to any person in any public way or public line of navigation'.—Every unauthorized obstruction of a high way to the annoyance of the King's subjects is an indictable offence Thus it is an offence for stage coaches to stand plying for passengers in public streets[3] A permanent obstruction on a high way, erected and placed there without lawful authority, which renders the way less commodious to the public, is an unlawful act and a public nuisance although it be not placed upon the hard or metalled part of the highway or upon a footpath artificially formed upon it, and although sufficient space for the public traffic remains[4]

Under this section it must be established that the act of the accused had ... to any particular person or class of persons[5] ... the side of a thoroughfare in a town, when ... particular person or persons, was no offence[6] Where the danger or obstruction is not caused to any particular person the person obstructing would be guilty under s 290 and not under this section[7] But in a later case the Madras High Court has held that where the evidence showed that an obstruction placed on a road must necessarily prevent vehicles from passing at all and foot-passengers from passing without inconvenience, it was a necessary inference that persons were obstructed and that it was not necessary to expressly prove that any specific individual was actually obstructed[8]

1 *Attorney General v Tod Heatley*, [1897] 1 Ch 560

2 *Narain Adhikari*, (1904) 8 C W N 369

3 *Cross* (1812) 3 Camp 224

4 *The United Kingdom Electric Telegraph Co*, (1862) 9 Cox 137

5 *Khader Moidin* (1881) 4 Mad 235, *Virappa Chetti*, (1896) 20 Mad 433 *Jugal Das Dalal*, (1893) 20 Cal 665, *Peni Madhab Chakravarti* (1897) 25 Cal 273, *Pam Singh*, (1882) 11 C L R 462 The former Chief Court of Lower Burma held likewise: *Maul Ally* (1900) 7 Burma L R 125.

6 *Khader Moidin*, sup

7 *Virappa Chetti*, sup, *Umesh Chandra Kar*, (1887) 14 Cal 656.

8 *Venkappa*, (1913) 38 Mad 205 *Syed Julan*, (1920) 1 P L T 564

Where the accused allowed a prickly-pear fence, which formed a boundary between accused's yard and the road, to extend itself over a part of the road, and an obstruction of the road was thereby caused, it was held that his act was punishable. The Court said: "Prickly-pear is a plant which naturally extends itself very rapidly; and it is the duty of those who use it as a hedge by the side of a public road to take care that the road is not obstructed by its growth"[1]. The accused, who had a toy shop, exhibited in the windows of their shop, overlooking a public road, certain clock-work toys during the Divali festival. A large crowd of people collected on the road to witness the toys, in consequence of which there were dangerous rushes, several persons were knocked down and great obstruction and danger were caused to those using the road. The accused were asked by the police to stop the exhibition but they did not obey. On these facts, the Magistrate convicted the accused of offences under this section and s. 114. It was held that there was obstruction, danger and injury to the persons using the public way, which amounted to a public nuisance, and that the efficient cause of the nuisance was the act of the accused, inasmuch as in working the toys in the manner they did, their object was to attract a crowd, and as they knew that a crowd would be attracted by what they did, they must be regarded as having intended that consequence[2].

'Public way'.—See s. 279, *supra*. A pathway which lies over private land and which is used by the villagers and perhaps by the inhabitants of some other villages also, but with regard to which there is no evidence of such universal user as to raise an inference of dedication to the public in general, is not a public way such as is contemplated by this section.

Ways permitted to be used by a section of the public are private ways, generally having their origin in custom, but such ways can be converted into ordinary highways after user by the public sufficient to raise a presumption of dedication to the public in general. Evidence in support of public claim must be cogent.

There can be a dedication to the public for a limited purpose, e.g., access to a particular building, and consequently that a pathway does not join a public thoroughfare at either end does not militate against its public character[3].

'Public line of navigation'.—It is a nuisance to divert part of a public navigable river whereby the current is weakened and made unable to carry vessels of the same burden as it could before, or to lay logs of timber in it, or to erect a jetty so as to interfere with the navigation, or to build a bridge over it has the same effect[4].

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not thereby be occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection[5]. On the trial for an indictment for a nuisance in a navigable river and common King's highway, called the harbour of C, the erecting of an embankment in the waterway was held to be a public nuisance although the inconvenience was counterbalanced by the public benefit in some other way[6].

English cases.—A wagoner occupying one side of a public street in a city, before his warehouses, in loading and unloading his wagons for several hours at a

1 *Palakora Kathersa*, (1883) Weir (3rd edn.) 140.

2 *Noor Mahomed Suleman*, (1911) 13 Bom. L. R. 209, 1 Bom. Cr. C. 23, 35 Bom. 368. See *Lyons Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631, 644.

3 *Pran Nath Kundu*, (1929) 33 C. W. N. 915.

4 Russell, 6th Edn., Vol. I, p. 843.

5 *Attorney-General* v. *Terry*, (1874) L. R. 9 Ch. 423.

6 *Ward*, (1836) 4 Ad. & El. 384. See *Umesh Chandra Kar*, (1887) 14 Cal. 656; *Jugal Das Dalal*, (1893) 20 Cal. 665.

time both day and night, kept one
houses, so that no carriage could p
a nuisance[1] Where a person, havir
windows and thereby attracted a cr
to be obstructed, so that the public could not pass as they ought to do, it was held that he was guilty of a nuisance[2] Where a person removed the pavement and dug trenches in the roadway and footway of a public thoroughfare in order to lay down service pipes for the supply of gas from mains to private houses, it was held that this was not a temporary obstruction of the highway as might be necessarily incidental to the enjoyment of his property[3] Where the accused for the purposes of profit to themselves placed telegraph posts upon a highway, and did permanently keep them there, such posts being of such sizes and dimensions as to obstruct and prevent the passage of carriages and horses or foot passengers, it was held
ime altered
to change
, and also
d, thereby
ed a train,
which would have passed the station without slackening speed, to slacken speed, and to come nearly to a stand Another train going in the same direction, and on the same rails, was due at the station in half an hour It was held that the accused had obstructed a train[5] A person improperly went on a line of railway, and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by the inspector of the line when desirous of stopping a train The driver was thereupon induced to diminish the speed from twenty to four miles per hour It was held that this amounted to an obstruction[6].

PRACTICE.

Evidence.—Prove (1) that the accused caused the danger, obstruction or injury in question

(2) That the same was caused by his act, or omission, to take order with property in his possession or under his charge

(3) That the person put in danger, or obstructed, or injured, was then in a public way or public line of navigation

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Negligent conduct with respect to poisonous substance

284. Whoever does, with any poisonous substance, any act[1] in a manner so rash or negligent[2] as to endanger human life[3], or to be likely to cause hurt[4] or injury[5] to any person,

or knowingly or negligently omits to take such order[6] with any poisonous substance in his possession[7] as is sufficient to guard against probable danger to human life from such poisonous substance,

[1] *Russell*, (1805) 6 East 427
[2] *Carlile*, (1834) 6 C. & P 636.
[3] *Stoke Fenton and Langton Gas Co*, (1860) 29 L. J (M C.) 118
[4] *Baron Lionel De Rothschild v The United Kingdom Electric Telegraph Co*, (1862) 31 L. J (M. C.) 166.
[5] *Joseph Hadfield*, (1870) L. R. 1 C. C. R. 253
[6] *Hardy*, (1871) L. R. 1 C. C. R. 278.
[7] *Ghulam Raza*, (1923) 25 Cr L. J 707.

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Under this section "a person in possession of a poisonous substance should have negligently omitted to take such order with it as is sufficient to guard against any probable danger to human life from such substance. The gist of the offence is culpable negligence. The fact that a person has the custody of any dangerous substance, suffices itself to impose upon him the duty of being careful; and he is criminally responsible if he negligently omits to take such order with the substance as is sufficient to guard against any probable danger from such substance to human life, whether the substance be poison, or fire, or a combustible, or explosive substance or machinery...It is not necessary to constitute an offence under that section, that the negligent omission punishable under it should be followed by any disastrous consequences"[1].

This section proceeds on the principle that carelessness, when sufficient in degree, is to be regarded as criminal notwithstanding that it may not have occasioned hurt.

1. **'Act'.**—See s. 32, *supra.*

2. **'Rash or negligent'.**—See s. 279, *supra.*

3. **'Endanger human life'.**—See s. 279, *supra.*

4. **'Hurt'.**—See s. 379, *infra.*

5. **'Injury'.**—See s. 44, *supra.*

6. **'To take such order.'**—See s. 283, *supra.* Where the accused, a sergeant in the police, took over a desk containing poisonous powders and other powders, which might easily be mistaken one for the other, without taking any precaution whatever to guard against misuse of the poison, and the only order he took with the poison subsequently was to hand over the key of the receptacle in which the powders were kept, to a subordinate official who by mistake issued some of the poisonous powders to a Deputy Inspector suffering from fever, who took one of the powders and died, it was held that the accused was guilty under this section[2].

7. **'Possession'.**—See s. 27, *supra.*

PRACTICE.

Evidence.—Prove (1) that the substance in question is poisonous, and, if taken, would be dangerous to life, or likely to cause hurt or injury.

(2) That the accused did an act therewith, which endangered, or was likely to endanger, human life, or was likely to cause hurt or injury.

(3) That he did such act rashly or negligently.

Or prove (1) as above, and further—

(2) That the accused was in possession of such substance.

(3) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(4) That such omission was negligent, or with a knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

[1] Per Plowden, J., in *Hosein Beg,* (1882) P. R. No. 16 of 1882.

[2] *Ibid.*

285 Whoever does with fire or any combustible matter, any act[1] so rashly or negligently[2] as to endanger human life[3] or to be likely to cause hurt[4] or injury[5] to any other person

Negligent conduct with respect to fire or combustible matter

or knowingly or negligently[6] omits to take such order[7] with any fire or any combustible matter in his possession[8] as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both

COMMENT

This section further extends the previsions of the preceding section

1 **'Act** —See s 32 *supra*

2 **'Rashly or negligently** —See s 279 *supra* The section is not applicable where the act of the accused is wilful and not rash or negligent The accused had a quarrel with his wife about some rice He got angry broke the crockery and then went out and set fire to the eaves of his house thereby causing risk of injury

which rashness or negligence can be inferred[2]

3 **'Endanger human life'** —See s 279 *supra*

4 **'Hurt** —See s 319 *infra*

5 **'Injury** —This word includes any harm illegally caused to the property of any other person and is not confined to injury to the person only While a marriage procession was going on the accused who was one of the procession used fire works on the road which burnt two bundles of the straw with which a *mandap* (a temporary structure) belonging to the complainant was thatched thereby causing him an injury It was held that the accused was guilty under this section[3]

See s 44 *supra*

6 **'Knowingly or negligently** —See s 286 *infra*

7 **Take such order** —See s 283 *supra*

8 **'Possession** —See s 27 *supra*

CASES

Fire baloons —Letting off fire balloon is no offence[5]

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4 *Krishna* (18 b) Unrep Cr C 134

5 *Nga Bo Gale* (1899) P J L B 628.

English cases.—Keeping great quantities of gunpowder so as to endanger the safety of houses in the vicinity[1], or keeping of a dangerous, ignitable and explosive fluid called naptha near dwelling-houses[2], amounts to nuisance.

PRACTICE.

Evidence.—Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.

(2) That such act was done with fire or some combustible matter.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession some fire or combustible matter.

(2) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(3) That such omission was negligent or with knowledge of such probable danger[3].

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Preventive powers.—See ss. 133 and 144 of the Criminal Procedure Code.

Negligent conduct with respect to explosive substance.

286. Whoever does, with any explosive substance[1], any act so rashly or negligently[2] as to endanger human life[3], or to be likely to cause hurt[4] or injury[5] to any other person,

or knowingly or negligently[6] omits to take such order[7] with any explosive substance in his possession[8] as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The last section dealt with 'fire or combustible matter', this section deals with 'explosive substance', otherwise the provisions of both the sections are alike.

Scope.—The first part of this section is not confined to cases where the explosive substance is in the possession of the accused at the time of the injury but it also applies to a case where the injury takes place after it has left his possession and is being conveyed to its destination[4].

1. **'Explosive substance'.**—No definition of this expression occurs in the Code, but under the Explosive Substances Act, 1908, this expression is "deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any dart of such apparatus, machine or implement"[5].

[1] *Taylor*, (1742) 2 Strange 1167. In *Bennett*, (1858) 8 Cox 74, 28 L. J. (M. C.) 27, the prisoner had kept a quantity of fireworks for a long time but owing to the negligence of his servant it caught fire and set to blaze a house in which a person was burnt to death. It was held that the prisoner could not be convicted of manslaughter as the proximate cause of death was the negligence of his servant.

[2] *Lister*, (1857) Dearsly & B. 209.

[3] *Nga Ka*, (1903) U. B. R. (P. C.) 7; *Nga Cho*, (1887) S. J. L. B. 411; *Nga Ya Po*, (1885) S. J. L. B. 337.

[4] *Anantanarayana Pattar*, (1898) 1 Weir 236.

[5] Act VI of 1908, s. 2.

Revolver is not an explosive substance—An Assistant Collector left a loaded six chambered revolver upon his office box on the platform of a railway station while he went into the Station Master's room to change his clothes His peon took up the revolver and apparently not knowing how to handle it, one chamber went off wounding a police constable, who was standing near, in the eye It was held that the accused could not be convicted, as a 'revolver' was not an 'explosive substance' though, had rashness or negligence on the part of the peon been shewn, he would have been convicted under s 337[1].

2. **'Rashly or negligently'**—See s 279, *supra*

3. **'Endanger human life'**—See s 279, *supra* The substance must be of such a nature and kept in such large quantities and under such local circumstances as to create real danger to life and property A well founded apprehension of danger, which would alarm a man of steady nerves and reasonable courage passing through the street in which the house stands, or residing in adjoining houses is enough to show that something has been done which the law ought to prevent[2] The accused having returned to his house after dawn from watching his crops at night with a loaded gun and finding his house-door locked placed the gun loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house In his absence the child of a neighbour came to the cot and began playing with the gun, which went off and killed the child It was held that he could not be convicted under this section as it could not be said that the accused must have known or ought to have considered it to be probable, that a child or children would be likely to be playing about in that place, and that it or they would be likely to handle or play with the gun and that the danger which actually occurred had been such a probable danger as that he could be held responsible[3]

4. **'Hurt'**—See s 319, *infra*

5. **'Injury'**—See s 44, *supra*

6 **'Knowingly or negligently'**—The word knowingly is evidently used in this section advisedly and the word 'intentionally advisedly not used What ever distinction there may be between 'knowingly or negligently and rashly or negligently' consciousness is involved in both while intention is not If a person omit to take precautions in respect of explosives in his possession sufficient to guard against any probable danger to human life, being conscious of the probability of danger resulting from such omission he knowingly does that which under this section renders him liable to punishment If a person omits to take such precautions without such consciousness, he is liable, by reason of his negligence, if he 'has not exercised the caution incumbent on him', and which if he had exercised it, would have created in him the consciousness that his omission was likely to cause danger"[4].

7. **'Take such order'.**—See s 283, *supra*

8. **'Possession'.**—See s 27, *supra*

PRACTICE.

Evidence.—Prove the same points as those required for s 285 showing that the act of the accused was done with 'any explosive substance'

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily

1 *Kasiya Pillai*, (1886) 1 Weir 235
2 *Lister*, (1857) 26 L. J (M C) 196.
3 *Chenchugadu*, (1885) 8 Mad. 421
4 Per Brandt, J, in *Chenchugadu*, *ibid*, p. 422

Negligent conduct with respect to machinery.

287. Whoever does, with any machinery, any act[1] so rashly or negligently[2] as to endanger human life[3] or to be likely to cause hurt[4] or injury[5] to any other person,

or knowingly or negligently[6] omits to take such order[7] with any machinery in his possession[8] or under his care[9] as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Machinery or parts of machinery is or are dangerous if in the ordinary course of humnn affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree[1].

An owner of machinery is criminally liable if he compels his servants to work it in an unsafe condition knowing it to be so, in a manner likely to endanger human life; and under such circumstances the fact that he has employed a competent man to look after the machinery is not a sufficient answer to the charge. If he employs a competent man to work it and leaves him unfettered, he cannot be held criminally responsible for any accident due to the errors of his employee[2].

1. **'Act'.**—See s. 32, *supra*.
2. **'Rashly or negligently'.**—See s. 279, *supra*.
3. **'Endanger human life'.**—See s. 229, *supra*.
4. **'Hurt'.**—See s. 319, *infra*.
5. **'Injury'.**—See s. 44, *supra*.
6. **'Knowingly or negligently'.**—See s. 286, *supra*.
7. **'Take such order'.**—See s. 283, *supra*.
8. **'Possession'.**—See s. 27, *supra*.
9. **'Or under his care'.**—These words would include an engineer, and all mechanics. The expression used in s. 283 is 'under his charge'.

PRACTICE.

Evidence.—*Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.*

(2) That such act was done with a machinery.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession or under his care some machinery.

1 Per Wills, J., in *Hindle* v. *Birtwistle*, [1897] 1 Q. B. 192, 195.

2 *Kanhayo Lal*, (1906) P. R. No. 8 of 1906.

(2) That he omitted to take such order therewith as was sufficient to guard against a probable danger to human life therefrom

(3) That such omission was negligent or with knowledge of such probable danger

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency or first or second class—Summary trial

Negligent conduct with respect to pulling down or repairing buildings

288 Whoever, in pulling down or repairing any building, knowingly or negligently[1] omits to take such order with that building as is sufficient[2] to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

COMMENT

This section deals with negligent conduct with respect to pulling down or repairing buildings If a building is situated on a public way and is in a dangerous condition and likely to injure persons using the way then s 283 will apply and not this section

1 **'Knowingly or negligently'** —See s 286 *supra*

2 **'Such order as is sufficient'** —The degree of care required by this section will vary in proportion to the actual necessity of the case If the building is in a populous place more care will be necessary than when it is in a place less frequented by people

PRACTICE

Evidence —Prove (1) that the accused was pulling down or repairing a building

(2) That he omitted to take sufficient order therewith to guard against a probable danger

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate Presidency, first or second class—Triable summarily

Negligent conduct with respect to animal

289 Whoever knowingly or negligently[1] omits to take such order[2] with any animal[3] in his possession[4] as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal[5], shall be punished with imprisonment of either description for a term which may exte[illegible] to six months, or with fine which may extend to one thou[illegible] rupees, or with both

COMMENT

This sect on deals with improper or careless management of an[illegible]

1. **'Knowingly or negligently'.**—The offence consists principally in a knowing or negligent omission, and not merely in an omission which is not an offence[1]. See Comment on s. 286, *supra*.

2. **'Take such order'.**—See s. 283, *supra*.

3. **'Animal'.**—See s. 46, *supra*. This section does not refer to savage animals alone, but to any animal, e.g., a pony[2], or a dog[3].

In the case of wild and savage animals, a savage or mischievous temper is presumed to be known to their owner and to all men as a usual accompaniment of such animals; and, hence, a positive duty is cast on the owner to protect the public against the mischief resulting from such animals being at large. Anyone who keeps such a wild animal as a tiger or a bear, which escapes and does damage, is liable without any proof of the animal's ferocity. In such a case it may be said *res ipsa loquitur*.

In the case of animals which are tame and wild in their general temper no mischievous disposition is presumed. It must be shewn that the accused knew that the animal was accustomed to do mischief. Some evidence must be given of the existence of an abnormally vicious disposition[4]. A single instance of ferocity, even a knowledge that it has evinced a savage disposition, is sufficient notice[5].

"Before the owner or keeper of the animal can be convicted under this section, it must be made out that the animal was known to be ferocious, and that it was negligently kept. It is, however, not necessary to show that the animal had actually bitten or injured another person before it bit or injured the complainant: it would be enough to show that, to the knowledge of the owner, it had evinced a savage disposition, e.g., by attempting to bite"[6]. Where the accused's buffalo attacked the complainant's buffalo and injured the latter by breaking its leg, he was held not guilty of this offence as there was no evidence to show that the buffalo was of a savage disposition as against human beings[7]. Where a person was injured by a buffalo, which was known to be a dangerous animal, the herdsman who was present and failed to avert the injury and the owner of the buffalo were held to have committed an offence under this section[8].

4. **'Possession'.**—See s. 27, *supra*. The animal must be in the actual possession of the person against whom a charge is brought under this section, whoever may be the owner of it. Where the accused, a horsekeeper, harnessed his master's horse, put him into his carriage, and then went away, leaving the horse and carriage standing in the road of the compound of his master's house, without any justification, it was held that the accused had committed an offence under this section, since the horse was not the less in the actual possession of the servant, because it was for some purpose in the constructive possession of his master[9]. A bull was let loose by the father of the accused some years ago. On its becoming vicious it was ordered to be shot. The accused having claimed its ownership was convicted of this offence. It was held that it could not be said that the animal was in the possession of the accused and therefore the conviction was illegal[10]. A Hindu, set at large, in accordance with a religious usage, a young bull, which a considerable time afterwards became dangerous. He was prosecuted and convicted under this section. It was held that as the bull was not then in his possession and was not dangerous when set at large, the conviction was bad[11].

1 (1866) 5 W. R. (Cr. L.) 8.
2 *Chand Manal*, (1872) 19 W. R. (Cr.)1.
3 *Mg. Shwe Zin* v. *Mg. Po Ngwe*, (1923) 2 B. L. J. 8.
4 (1880) 1 Weir 238; *Baker* v. *Snell*, [1908] 2 K. B. 825; *Lowery* v. *Walker*, [1911] A. C. 10.
5 See the authors' "The Law of Torts," 10th Edn., p. 377.
6 Per Meres, J. C., in *Thaukera Aung*, (1885) S. J. L. B. 353.
7 *Pandu*, (1884) Unrep. Cr. C. 197.
8 *Shamlay*, (1906) 3 N. L. R. 90.
9 *Natha Reva*, (1881) Cr. R. April 1881, Unrep. Cr. C. 163.
10 *Fatta*, (1889) P. R. No. 32 of 1889.
11 *Shambu Dial*, (1904) P. R. No. 5 of 1904.

5. **'Probable danger to human life, or any probable danger of grievous hurt from such animal'.**—'Grievous hurt' is defined in s 320, *infra* Unless there is a probability of danger to human life or of danger of grievous hurt no negligent omission to take such care of an animal as to guard against such danger will be punishable under this section Where a pony kicked a child on a road, a conviction under this section was set aside, because there was no such negligence as would produce danger to human life, or grievous hurt[1], but where a pony which was tied negligently, got loose, and ran through a crowded bazaar, it was held that ... might create danger ... the bazaar[2] Where ... o attack bullocks, to be at large, it was held that he was liable under this section as he had knowledge that there was probable danger to human life or limb[3] Where the accused's dog ... it was held that he was liable under ... he accused's bullock escaped from a ... h was close by the accused's house ate up some clothes, it was held that he was not guilty, because it was through no negligence of his that the bullock escaped and after the escape he had done all he could to find it[5] The mere fact that a rope tied to a bullock when violently strained, broke, was held to afford no proof of negligence[6] The accused owned an ape which escaped by breaking its chain It was afterwards caught but escaped again On this he was convicted under this section, but the High Court quashed the conviction holding that it must be established in the affirmative that the accused knowingly or negligently omitted to take such order with the animal as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal[7].

PRACTICE

Evidence.—Prove (1) that the animal was in the possession of the accused.

(2) That the accused omitted to take sufficient order therewith to guard against probable danger to human life or of grievous hurt therefrom[8]

(3) That such omission was negligent, or with knowledge of such probable danger

If the animal is not naturally fierce or vicious, the onus of proving negligence lies on the prosecution[9]

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily

Punishment for public nuisance in cases not otherwise provided for

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

COMMENT.

In several sections of this Chapter punishments are provided for various specific public nuisances This section provides for the punishment of any nuisance falling within the four corners of the definition given in s 268 but not punishable under any other section

... 18 ... 1923) ... 2 B L J 8.

[3] *Lingappa* (1892) Unrep Cr C. 606.

[6] *Subbarayn Padayachi*, (1890) 1 Weir 237.

[7] *Muhammad Sadiq* (1904) 1 A. L. J 693.

[8] (1867) 3 M H C. App. 33

[9] *Brojonarain Pubray* (1865) 2 W. R. (Cr) 51

PRACTICE.

Evidence.—Prove (1) that the accused did an act or was guilty of an illegal omission.

(2) That such act or omission caused injury, danger, or annoyance.

(3) That such injury, danger, or annoyance was common to the public or the people in general who dwell or occupy property in the vicinity.

Or prove (1) that the accused did an act or was guilty of an illegal omission.

(2) That the act or omission in question must necessarily cause injury, obstruction, danger, or annoyance.

(3) That such injury, danger, or annoyance must necessarily be caused to persons who may have occasion to use any public right[1].

Procedure—Not cognizable—Summons—Bailable—Not compoundable—*Triable by any Magistrate—Summary trial.*

Imprisonment in default of fine.—Such imprisonment should be simple only, according to the Bombay High Court[2]; but, according to the Madras High Court, *the award of rigorous imprisonment is not illegal*[3].

Offence under Special Act.—The fact that there was a special law to meet a particular offence does not prevent the punishment of the offenders under the Penal Code, if an offence which could have been rightly punished under it was established[4]. The accused should be given an opportunity to meet the charge[5].

Prosecution should be against a proper person.—A prosecution cannot be instituted against the chairman of a municipality under this section for keeping a rubbish depot in the neighbourhood of houses but should be against the municipal corporation[6].

Continuance of nuisance after injunction to discontinue.

291. Whoever repeats or continues a public nuisance, having been enjoined[1] by any public servant[2] who has lawful authority to issue such injunction[3] not to repeat or continue such nuisance, shall be punished with simple imprisonment *for a term which may extend to six months, or with fine, or* with both.

COMMENT.

This section punishes a person continuing a nuisance after he is enjoined by a public servant not to repeat or continue it. Sections 142 and 143 of the Code of Criminal Procedure, for instance, empower a Magistrate to forbid an act causing a public nuisance. The Civil Procedure Code also empowers a Court to issue a temporary injunction.

1. **'Enjoined'.**—It must be proved that the accused had on some previous occasion committed the particular nuisance, and had been personally enjoined not to repeat or continue it, and had repeated and continued it[7]. A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf may order any person not to repeat or continue a public nuisance[8].

1 *Onooram* v. *Lamessor*, (1868) 9 W. R. (Cr.) 70.
2 *Santu bin Lakhappa Kore*, (1868) 5 B. H. C. (Cr. C.) 45.
3 *Yellamandu*, (1882) 5 Mad. 157; contra, *Mala Obigadu*, (1882) 1 Weir 239.
4 *Onooram* v. *Lamessor*, sup.
5 *Raghunath Kandu*, (1925) 24 A. L. J. 168.
6 *Chairman of Municipal Council, Ellore*, (1894) 1 Weir 243.
7 *Jokhu*, (1886) 8 All. 99.
8 Criminal Procedure Code, s. 143.

2. 'Public servant'.—See s 21, *supra*

3 'Injunction'.—The injunction should be before the Court; a proclamation to the public, or a portion of the public, is not sufficient Strict proof of all the circumstances constituting the offence and especially of one which is not *malum in se* should be required as the basis of a conviction[1].

PRACTICE.

Evidence.—Prove (1) the issue of the injunction

(2) That such injunction was legally issued

(3) That the injunction is one which restrains the repetition or continuance of a public nuisance

(4) That the accused was enjoined by such injunction from repeating or continuing such nuisance

(5) That he has repeated or continued the same public nuisance

Before a conviction can be had under this section, there must be proof that there was a previous conviction of an offence and an injunction by a public servant to desist from continuing such nuisance[2]

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial

The order of the Magistrate forbidding the continuance of the nuisance, or evidence of notice of such a character as to make plain the precise terms of the order and notice, should be recorded in the case[3].

Sale, etc, of obscene books, etc

292. Whoever—

(*a*) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in his possession any obscene[1] book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(*b*) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(*d*) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(*e*) offers or attempts to do any act which is an offence under this section,

[1] *Gunya*, (1886) Cr. R. No. 39 of 1886, Unrep Cr C. 295

[2] *Mohesh Chunder*, (1873) 20 W. R. (Cr) 55

[3] *Gunya*, sup.

of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession. The pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. The pamphlet also contained a preface and notes and comments condemnatory of the tenets and principles of the authors of the work from which the extracts were made. About one-half of the pamphlet related to casuistical and controversial questions, but the remainder of it was obscene. A member of the Society kept and sold these pamphlets. It was held that the publication of such a pamphlet was an offence as the inevitable effect of the publication must be to injure public morality[1]. Subsequently to this case, a pamphlet was published giving a correct report of the trial of one G for selling "Confessional Unmasked", but setting out that work in full. It was held that the pamphlet, though a report of judicial proceedings, was an obscene book[2]. A pamphlet which ridiculed the Head Priest of the community of Bohras and which abounded in passages expressing or presenting to the mind or view something which delicacy, purity and decency forbade to be expressed or exposed came within the purview of this section[3].

The accused published a pamphlet containing a series of quotations from the Koran with his comments. There were several passages in it of an objectionable nature but there was one relating to the Virgin Mary which was perverted by the incompleteness of the quotation and commented on in a very offensive form, the language employed being not such as might be used in a bona fide controversial treatise. It was held that he was guilty under this section[4].

PRACTICE.

Evidence.—Prove (1) that the book, etc., is of an obscene nature.

(2) That the accused—

(*a*) sold, let to hire, distributed, publicly exhibited or in any manner put into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation made, produced or had in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(*b*) imported, exported or conveyed any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object would be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) took part in, or received profits from, any business in the course of which he knew or had reason to believe that any such obscene objects were for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(*d*) advertised or made known by any means whatsoever that any person was engaged or was ready to engage in any act which was an offence under this section, or that any such obscene object could be procured from or through any person, or

(*e*) offered or attempted to do any act which was an offence under this section.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Power of destruction.—On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had[5].

1 *Hicklin*, (1868) L. R. 3 Q. B. 360.
2 *Steele* v. *Brannan*, (1872) L. R. 7 C. P. 261.
3 *Held* by Hayward, J., (Shah J., dissenting) in *Rahimatalli M. Mulla*, (1919) 22 Bom. L. R. 166, 5 Bom. Cr. C. 175.
4 *Hari Singh*, (1905) 28 All. 100.
5 Criminal Procedure Code, s. 521.

High Court if the case has been transferred may either try the case *de novo* or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained[1]

Punishment —The section says nothing about intention or about medical works or about agency of distribution or about immunity because only concrete cases are dealt with or the rest of the publication is unobjectionable but these points nevertheless indirectly affect the *quantum* of punishment[4]

Sale etc of obscene objects to young person

293 Whoever sells, lets to hire distributes exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both

COMMENT

This section was inserted by s 2 of the Obscene Publications Act (VIII of 1925)

It merely enhances the punishment where the obscene objects are sold etc, to persons under the age of twenty years

In the final Act of the International Conference which drafted the convention it was stated that the conference generally was of opinion that the offence of offering delivering selling or distributing obscene objects must be held to have been aggravated when committed in respect of minors The Council [of the League] considered that it would be preferable to leave each State free to fix the age under which a person should be considered to be a minor for the purposes of this provision [3]

The principle of this recommendation has been given effect to in this section.

PRACTICE

Evidence —Prove (1) that the book etc is of an obscene nature

(2) That the person to whom it was sold etc or offered or attempted to be sold was under the age of twenty years

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate Presidency, or first or second class

Power of destruction —On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had[4]

Obscene acts and songs

294 Whoever, to the annoyance[1] of others,

(a) does any obscene act[2] in any public place[3], or

(b) sings, recites or utters any obscene songs[4], ballad or words, in or near any public place,

[1] *Upendronath Dass* (1876) 1 Cal 356 *Mt Hira Bi*, (1894) S J L B 262.
[2] *Thakur Datt* (1917) P R No. 25 of 1917
[3] Statement of Objects and Reasons, *Gazette of India*, 1921 Part V p. 173.
[4] Criminal Procedure Code s. 521

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENT.

Object.—This section was substituted for the original section by Act III of 1895, s. 3. The object of the first clause is to meet a case of indecency common in the Presidency of Madras. It has reference to an unreported case in that Presidency.

1. 'Annoyance'.—Unless annoyance is caused the act will not be punishable. There must be definite evidence that annoyance was caused to a particular person or persons in general.

2. 'Obscene act'.—Indecent exposure of one's person or sexual intercourse in a public place will be punished under this section.

3. 'Public place'.—See Comment on s. 159, *supra*, as to the meaning attached to this expression[1]. Acts such as indecent exposure of one's person in an omnibus[2], in a public urinal[3], or in a place where the public go[4], will fall under this section. In England it has been held that an indecent exposure in a place of public resort, if actually seen by only one person, no other person being in a position to see it, is not a common nuisance[5]. If the act be done where a great number of persons may be offended by it, and several see it, it is sufficient. Where a man exposed himself indecently on a roof at the back of a house so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, it was held that he could be convicted for his act[6].

4. 'Song'.—A *lavni* is not necessarily an obscene song. It may be, and often it is, so, but it must be proved that the words of it are actually obscene before a conviction can be supported under this section[7].

PRACTICE.

Evidence.—Prove (1) that the accused did some act; or that the accused sang, recited or uttered any obscene songs, ballad or words.

(2) That this was done in or near a public place.

(3) That it was of an obscene nature.

(4) That it caused annoyance to others.

Omission to set out obscene words in evidence.—Where the obscene words used by the accused were not set out in the evidence, it was held that the omission was not a sufficient ground for setting aside a conviction[8].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

A conviction under this section for uttering an obscene abuse in a public place may amount to a conviction for an offence involving breach of the peace within the meaning of s. 106, Criminal Procedure Code[9].

Sentence.—A sentence of three months' rigorous imprisonment for using obscene language in a public place is unduly severe[10].

1 See also *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.
2 *Charles Holmes*, (1853) 22 L. J. (M. C.) N. S. 122.
3 *Harris*, (1871) L. R. 1 C. C. R. 282.
4 *Wellard*, (1884) 14 Q. B. D. 63; *Saunders*, (1875) 1 Q. B. D. 15.
5 *James Webb*, (1848) 1 Den. Cr. C. 338. See *Allington Elliott*, (1861) L. & C. 103.
6 *Thallman*, (1863) 33 L. J. (M. C.) 58.
7 *Ganu bin Krishna Gurav*, (1867) 4 B. H. C. (Cr. C.) 25.
8 *Narasamma*, (1882) 1 Weir 251.
9 *Mi Kun Ya*, (1904) U. B. R. (P. C.) 4.
10 *Parliam*, (1923) 2 B. L. J. 98.

294A. Whoever keeps any office or place for the purpose of drawing any lottery[1] not authorized by Government[2] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Keeping lottery office

And whoever publishes[3] any proposal to pay any sum, or to deliver any goods[4], or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery[5], shall be punished with fine which may extend to one thousand rupees

COMMENT.

This section was inserted by Act XXVII of 1870, s. 10. A lottery stands on the same footing as gambling because both of them are games of chance

"Every lottery is either authorized or not authorized by Government The section does not touch authorized lotteries, but [illegible] people from the effects of those not authorized (1st) by prohibiting the [illegible] of offices or places for drawing them, and (2ndly) by prohibiting the [illegible] of any advertisement relating to them After the first prohibition, the chance of any office being kept in British India for drawing lotteries not authorized by Government is very small indeed But people not subject to our laws [illegible] to open offices for that purpose out of British India, but still near our own doors—at Navsari or Daman for instance, and then send advertisements [illegible] widely circulated newspapers throughout British India In that case, if the section were to be narrowly [illegible] as applying only to lotteries to be drawn in British India, the object [illegible] the second prohibition, to prevent the [illegible] of people in British [illegible] drawn into temptation by such publications, would be very [illegible] defeated The words of the section are wide enough to include [illegible] and we have no reason to suppose the Legislature intended to [illegible] ments relating to them from the operation of section 294A"[1].

Ingredients—The first part of the section deals [illegible]

office It has two essentials —

1 Keeping of any office or place for the purpose [illegible]
2 Such lottery must not be authorized by [illegible]

The second part of the section deals [illegible] garding a lottery

The ingredients of the offence under the [illegible] there must be a lottery, secondly, there [illegible] number or figure in such lottery, and [illegible] proposal to pay any money or to deliver any [illegible] thing for the benefit of any person on any [illegible] to such drawing[2]

1. 'Whoever keeps any office or place for the purpose of drawing any lottery'.—The fact that [illegible] which is in the nature of a [illegible] keeping the office from liability [illegible]

'Keeps any office or place'—[illegible] for the purpose of a [illegible]

[1] Per [illegible] [illegible] Kanaji (1882) [illegible] [illegible]
[2] [illegible]

In order to constitute a keeping there must be something habitual[1]. The members of the committee of a club who exercise full control over club matters, inclusive of the premises, "keep" the premises of the club[2].

The words "office or place" for the purpose of drawing any lottery mean an office or place intended to be the scene of the actual drawing of the lottery, and do not include an office or place kept only for the correspondence and other work connected with a lottery advertised "as going to be in some public place to be selected later on"[3]. It is, however, not necessary that the place should be kept solely for the purpose of drawing a lottery[4]. Where a house is kept open for a double purpose, viz., as an honest social club for those who do not desire to play, as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery[5].

Clause (1) applies to cases in which it is shewn that the accused did keep an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys, and which they held out to the public as the place where the lottery would finally be drawn. It is not necessary that the lottery should be actually drawn. It is enough if all the preliminary work is carried on and monies are received for the purpose of a lottery[6].

'Drawing'.—The word 'drawing' is used in its physical sense; the actual drawing of lots is an essential ingredient of the offence under this section[7].

'Lottery'.—A lottery is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent [illegible] casting of lot[8]. A lottery is a distribution of prizes by lot or [illegible] no difference that the distribution is part of a genuine mercantile transaction[10]. Where a scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits, in certain events by lots will not vitiate the scheme and make it a lottery[11].

The principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lotteries are such that no prize at all is distributed and the organiser of the lottery pockets the whole of the stakes adventured the transaction does not cease to be a lottery. The actual distribution of a prize or prizes and contribution of the whole stake by the adventurers are not essential, the essential factor in the case is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organizer of the lottery, the scheme is none the less a lottery[12].

The necessary effect of a lottery is to beget a spirit of speculation and gaming that is often productive of serious evils.

A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each

1 *Martin* v. *Benjamin*, [1907] 1 K. B. 64; *Narayan Ayyangar* v. *Vellachami*, (1927) 50 Mad. 696, F.B.

2 *Cooke*, (1914) 7 L. B. R. 319.

3 *Madan Gopal*, (1910) P. R. No. 17 of 1910, P. L. R. No. 92 of 1910.

4 *Chakrabatty*, (1916) 9 B. L. T. 124; *Cooke*, sup.

5 *Cooke*, sup.

6 *Ramaswami Mudaliar*, (1922) 44 M. L. J. 595.

7 *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57, 9 Bom. Cr. C. 456.

8 *Kamakshi Achari* v. *Appavu Pillai*, (1863) 1 M. H. C. 448.

9 Per Hawkins, J., in *Taylor* v. *Smetten*, (1883) 11 Q. B. D. 207.

10 *Chakrabatty*, sup.

11 *Shanmugha Mudali* v. *Kumarasuami Mudali*, (1925) 48 Mad. 661, approved of in *Narayan Ayyangar*, v. *Vellachami* sup., which overruled *Veeranan Ambalam* v. *Ayyachi Ambalam*, (1925) 49 M. L. J. 791.

12 *Mukandi Lal*, (1917) P. R. No. 35 of 1917.

in his turn as determined by lot should take the whole of the subscriptions for one month it was held that the agreement was not illegal[1]

Agreement for contributions to be paid by lot is not lottery —An agreement whereby a number of persons subscribe each a certain sum by periodical instalments with the object that each in his turn (to be decided by lot) shall take the whole subscription for each instalment all such persons being returned the amount

who drew the ticket was paid Rs 50 and his connection with the transaction forthwith ceased This process was repeated month after month till the end of th 49th month At the end of the 50th month each of the remaining subscribers was paid Rs 50 and the stake holders divided the profit and the fund was dissolved Defendant executed a promissory note to the plaintiff for money due o a settlement of accounts in respect of this transaction Plaintiff filed a suit o the promissory note but the same was dismissed as not being maintainable the chit fund itself amounting to a lottery It was held that the transaction was not a lottery and the plaintiff s suit was maintainable[3]

2 **'Not authorized by Government** —The lottery must have been authorized by the Indian Government It would not be sufficient to show that it has been authorized by British Government of another country e g Australia[4] The words not authorized mean no more and no less than unless authorized or not having been authorized or without authority and are in the nature of an exception or proviso A Collector is not authorized to sanction a lottery and the mere act of taking income tax on the profits of a lottery will not constitute authorization[5]

3 **'Publishes'** —The word publishes includes both the person who sends a proposal as well as the proprietor of a newspaper who prints the proposal as an advertisement

The intention of the Legislature appears to have been not only that chances etc in the lottery should not be sold but also that the public should not be informed where such chances etc could be purchased And they enacted that no person should publish these proposals to the world that the poor and ignorant sort of people might not know where these transactions were going on [6]

Mere publication in the newspaper will make the proprietor liable Under the Printing Presses and Newspapers Act[7] the printer or publisher is responsibl

can however escape liability b with the purpose of evading re was printed[9]

Publication of advertisement —The proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was convicted under this section[10] Publication of an advertisement of a Rs 52 500 lottery by which a ginning factory was to be raffled at Rs 5 tickets was held to be an offence within this section[11] Where on the face of a lottery ticket it is stated that the prize if any due to the number on the ticket will be paid it contains a proposal

1 *Kamalshi Achari* v *Apparu P lla* (1863) 1 M H. C. 448

2 *Vasudevan Nambudri* v *Mommod* (1898) 2? Mad. 21? See *Doraisami Mudaly* (1890) 1 Weir 251 *Wallingford* v *Mutual Society* (1880) 5 App Cas 685 *O Connor* v *B ad shaw* (1850) ?0 L. J Ex ?6

3 *Shanmugha Mudali* v *Kumaraswami Mudal* (1925) 48 Mad 661 approved of in *Narayan Ayyangar* v *Vellachami Ambalam*, (1927) 50 Mad. 696 F B.

4 *Mancherji Kavasji* (1885) 10 Bom 97

5 *Cooke* ((1914) 7 L. B R 319

6 Per Grose J in *Smith* (1791) 4 T R 414 419

7 Act XXV of 1867 s 4

8 *Phanendra Nath Mitter* (1908) 35 Cal 945

9 *Har Swarup* v *Muhammad S raj* (1928) 50 All 806

10 *Mancherji Kavasji* sup

11 *Pedda Malla* (19 0) 50 Mad 47?

inviting persons to take part in the lottery, and offering such a ticket for sale amounts to a publication of the said proposal and constitutes this offence[1]. But a mere publication on a trade hand-bill that tickets in a lottery (unauthorised) can be had at a particular place is no offence since it does not constitute a publication of a proposal to pay any sum on any event or contingency relating or applicable to the drawing of any ticket in any lottery not authorised by Government[2].

Publication of proposal.—The accused published a circular notifying different prizes on horses winning at the Derby races and on starters, and also other special prizes. The circular stated: "The sweep will close on May 23, 1924, and the draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924". The accused having been charged with publishing the proposal for a lottery, it was held that he was guilty of the offence charged, since he had published a proposal to pay a sum for the benefit of a person on an event or contingency relative or applicable to the drawing of the ticket in a lottery; and it did not matter that the payment proposed to be made was not made by the person advertising[3]. An announcement was made in the *Sun*, an evening paper, sold at half-penny, that for a certain period in certain issues of the newspapers spots of varying size and shape would be printed in the various parts of the issues. It was also stated that on a certain day an announcement would appear in the paper showing the exact configuration of certain spots which were to be declared to be winning spots, and that the person who had cut out from the various issues of the paper and sent to the office of the paper a portion of the newspaper containing the facsimile of what had been declared to be the winning spot would receive a prize. It was also announced that the prizes differed for different spots. The winning spots were arbitrarily selected by the proprietors of the newspaper and the winning of the prizes depended wholly upon chance. It was held that this was a publication of a proposal and scheme for a lottery[4].

The accused and another person ordered 5,00,000 circulars to be printed and prepared for posting. These circulars contained a proposal and scheme for the sale of tickets in a lottery. The envelopes for the circulars were supplied ready addressed by the accused, and the printers were paid by the accused by means of cheques signed by the other person. The printers printed 2,00,000 of the circulars, placed them in envelopes and closed and stamped the envelopes and delivered them to the accused, who took them away for the purpose of posting them. A large quantity of the envelopes were stopped in the course of post under instructions from higher authorities in the Post Office. Some of the envelopes were found open, but the contents of the others were not examined in the Post Office, and all were prevented from reaching the addressees. The accused was convicted under s. 41 of the Lotteries Act, 1923 (4. Geo. IV, c. 60), of 'publishing' a proposal and scheme for the sale of tickets in a lottery. It was held that although none of the circulars had reached the addressees, yet, as the proposal was made known to the printer, there was a sufficient publication within the Act, and the conviction must be affirmed. Reading, C. J., said: "Once it is established...that the appellant was responsible for sending the circular to the printing company to be printed, and that it was printed, there is an end to this appeal, for it is inconceivable that none of the printers read the circular. It was sent for the express purpose of being reproduced. When received for that purpose the printers must have read it. But it is argued that, nevertheless, that was not the publishing of a proposal. To my mind the fallacy of that argument consists in saying that publication only

1 *D'Souza*, (1925) 27 Cr. L. J. 777.

2 *Rachappa Murigeppa Shabadi*, (1924) 26 Bom. L. R. 968, 7 Bom. Cr. C. 211; *Vazirally*, (1928) 30 Bom. L. R. 1426, 53 Bom. 57, 9 Bom. Cr. C. 456.

3 *Chimanlal Pranjivandas Gheewalla*, (1925) 27 Bom. L. R. 363, 8 Bom. Cr. C. 39.

4 *Hall* v. *McWilliam*, (1901) 20 Cox 33. See to the same effect *Bottomley* v. *Director of Public Prosecutions*, (1914) 24 Cox 578.

means making known the nature of the proposal The moment the document has been made known to another then it is published [1]

4 **'Goods'** —This word includes both movable and immovable property[2]

5. **'Any such lottery'** —This expression means 'any lottery not authorized by Government' and includes a foreign lottery[3]

CASES

Transactions in which prizes are decided by chance amount to lottery.—A horse race being about to be run, 155 persons subscribed £1 each upon the terms that the names of the horses should be placed on separate cards, in one box, and the names of the subscribers on separate cards in another box, and that two disinterested persons should draw these cards by chance, one from each box, after the other, and that the person whose name was drawn next after the name of the winning horse should be entitled to £100 out of the entire fund It was held that this amounted to a lottery[4] The programme of an entertainment stated that at its conclusion the proprietor 'would distribute amongst the audience a shower of gold and silver treasures on a scale utterly without parallel besides a shower of smaller presents all of which would be impartially divided amongst the audience and given away' The seats of the audience were numbered At the conclusion of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat, and in that way distributed all the articles amongst the audience It was held that this was a lottery[6] A transaction in which tickets were drawn by subscribers of a shilling which entitled them at all events to what was professed to be a shilling s worth of goods, and also the chance of certain bonuses of goods of greater value than the shilling, was held to be an illegal lottery[5] The appellant erected a tent in which

In each packet

stated by the

the sale what

ilue The tea

was good and worth the money paid for it It was held that the act of the appellant did constitute a lottery[7] H kept a sweetstuff shop, and sold penny packets of American caramel Several packets contained a half penny in addition to a fair penny worth of sweets There had been no advertisement as to these inclosures It was held that H was guilty of keeping a lottery[8] The proprietor of a paper conducted competitions in the following manner A sentence was inserted in the paper with one word missing, intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the coupon and send it, together with a fee of 1s for each coupon, to the proprietor The missing word was decided upon before the commencement of the competition The entrance fees were divided among the successful competitors It was held that the competition constituted a lottery[9] A publican arranged at his beer house a sweep stake on a coming horse race There were sixty one entries, each person paying 6d to the publican Three prizes of 15s, 10s and five 5s, respectively, were offered by the publican on the result of the race, and one of the conditions of the sweep stakes was that the person who won the first prize should pay the publican at the beer house for two gallons of beer to be consumed in his house, the person who

[1] *Dew* v *Director of Public Prosecutions*, (1920) 89 L J K B 1166, 1167, 26 Cox 664

[2] [illegible]

[3] [illegible]

[4] [illegible]

Gatt [illegible]

[5] *Morris* v *Blackman* (1864) 2 H & C 912

[6] *Harris*, (1866) 10 Cox 352

[7] *Taylor* v *Smetten*, (1883) 11 Q B D 207

[8] *Hunt* v *Williams* (1888) 52 J P 821

[9] *Barclay* v *Pearson*, [1893] 2 Ch 154

won the second prize should pay for one gallon, and the person who won the third prize should pay for two quarts of beer. The winners of the prizes were ascertained by a drawing at the beer house, and the prizes were given by the publican to the winners, less the price of the beer which was deducted by him from the prizes. It was held that the sweepstake was an illegal lottery[1].

The proprietors of a weekly newspaper caused medals to be distributed gratuitously among members of the public; each medal bore a distinctive number and the words, "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day"; the winning numbers, which were arbitrarily selected by the newspaper proprietors and were unknown to the distributors, were published weekly in the newspaper. There were no coupons, and it was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, and the circulation in fact increased considerably during the progress of the scheme. It was held that, although it was possible for an individual holder of a medal to obtain a prize without paying anything for his chance, the medal holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, and that the scheme was a lottery[2].

Tickets, each bearing a different number were sold for 6*d*. each upon the terms that the purchaser of the tickets bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle as a prize. The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle. It was held that as each purchaser of a ticket bought a chance, and the holder of the ticket bearing the winning number was determined by chance, the scheme constituted a lottery and it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purchase of the prize[3].

The respondent, the proprietor of a music hall entertainment, who was giving a performance in a provincial theatre, announced to the audience that, "being possessed of a certain amount of wealth", he would distribute some of it, and his assistants would be supplied with postal orders, to be given away as he thought fit. Under his directions the assistants went along the seats, and they handed postal orders of small amounts to persons nearest them. Other postal orders of larger sums were handed to members of the audience who answered questions put by him to them from the stage as to their circumstances and in other instances to persons who stated their circumstances and requested the gift of an order. It was held that the distribution of the postal orders was made and determined by chance and without the exercise of any real judgment on the part of the respondent; and that the respondent had, therefore, 'exercised a lottery' contrary to s. 2 of the Lotteries Act, 1699[4].

Where the agreement for the sale of bonds was: "Every subscriber pays Rs. 10-8-0 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks and not only is negotiable, but can be cashed at the bank at par at any time. The draws were to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until every one had got a prize or had his money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize or decided to withdraw his money. Thus, the original ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc". It was held that the agreement showed that there was a scheme for the distribution of prizes by lot or chance and

1 *Hardwick* v. *Lane*, [1904] 1 K. B. 204.
2 *Willis* v. *Young*, [1907] 1 K. B. 448.
3 *Bartlett* v. *Parker*, [1912] 2 K. B. 497.
4 *Minty* v. *Sylvester*, (1915) 25 Cox 247.

the accused who put forward the scheme were guilty of an offence within the second part of this section[1]

The accused, the sole Agent in India of a certain brand of cigarette manufactured at Belfast, sent ten notes of five rupees each to the manufacturers, who put each note in a separate packet of cigarettes mixed those packets with other packets which contained no notes, and sent them out to the accused in India The accused published hand bills advertising the prize of Rs 5 which could automatically be obtained by purchasers of the cigarettes, which were sold at the same rate as before On a prosecution of the accused under the second part of this section, it was held that the scheme by the accused for distribution of prizes by lot or chance amounted to a lottery, and the publication of hand bills did not fall under this section (second part) inasmuch as there was no proposal to pay the sum on any event or contingency relative to the drawing of any lot The word 'drawing' is used in the first and second part of this section in its physical sense, the actual drawing of lots is an essential ingredient of the offence under the section[2]

Transaction requiring skill for winning prizes is not a lottery.—The accused published a newspaper containing an advertisement of a coupon competition", which was to be carried out by means of coupons, to be filled up by the purchaser of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third, and fourth in a race For every coupon filled up after the first the purchaser paid a penny, and the accused promised a prize of £100 for naming the first four horses correctly It was held that the transaction did not amount to a lottery[3] The accused published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer It was held that the competition, not being one the result of which depended entirely on chance was not a lottery[4] The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word, that all the sentences reaching the editor of the newspaper should receive careful consideration, and that the decision of the editor as to the prize winners should be final It was held that as the competition was one involving some degree of skill on the part of the competitors, and as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery[5]

Keeping a lottery.—The accused kept an eating house, exhibited placards headed "Great Eastern Money Club", "White Race Club for the Radcliffe Cup", etc, and sold tickets in respect thereof Prizes were drawn and the holders of the ticket whose numbers were drawn for prizes received the same, and the accused delivered out the prizes to such ticket holders, but there was no evidence to connect the defendant with any drawing by lottery or otherwise for the prizes It was held that this evidence was sufficient to support a conviction against the defendant of keeping a lottery[6]

[1] *Malan Gopal*, (1910) P L R No 92 of 1910, P R. No 17 of 1910

[2] *Jaswally*, (1928) 30 Bom L. R 1426, 53 Bom 57, 9 Bom Cr C. 457

[3] *Stoddart* v *Sagar*, [1895] 2 Q B 474 See *Stoddart*, (1900) 83 L.T 538, *Caminada* v *Hulton*, (1891) 60 L. J (M C) 116, 17 Cox 307

[4] *Hall* v *Cox*, [1899] 1 Q B 198

[5] *Scott* v *Director of Public Prosecutions*, [1914] 2 K B 868

[6] *James Crawshaw*, (1860) 8 Cox 375

PRACTICE.

Evidence.—Prove (1) that the accused had kept an office or place.

(2) That the office or place was used for the purpose of drawing a lottery.

(3) That such lottery was not authorized by Government.

For the second clause of the section prove—

(1) That the accused published the proposal in question.

(2) That the nature of such proposal was to pay, etc., on an event or contingency as described in the section.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Sanction.—No Court shall take cognizance of an offence under this section unless upon complaint made by order of, or under authority from, Government[1].

[1] Criminal Procedure Code, s. 196.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

'THE principle on which this Chapter has been framed is a princi[ple on] which it would be desirable that all Governments should act, but from wh[ich the] British Government in India cannot depart without risking the dissolut[ion of] society it is this, that every man should be suffered to profess his own re[ligion] and that no man should be suffered to insult the religion of another [1].

295 Whoever destroys, damages or defiles any pl[ace of] worship or any object held sacred by any [class] of persons[1] with the intention of thereb[y in]sulting the religion of any class of persons or [with] the knowledge that any class of person[s is] likely to consider such destruction dam[age or] defilement as an insult to their religion, shall be punished [with] imprisonment of either description for a term which may ex[tend] to two years, or with fine, or with both

Injuring or defiling place of worship, with intent to insult the religion of any class.

COMMENT

This section punishes the injury or defiling of a place of worship with [intent] to insult the religion of a class of persons Intention is the gist of the [offence] under it Mere defilement of a place of worship is not enough

Ingredients —The section requires two essentials —

1 Destruction, damage, or defilement of (a) any place of worship [or (b)] any object held sacred by a class of persons

2 Such destruction, etc , must have been done (i) with the inten[tion of] insulting the religion of a class persons, or (ii) with the knowledge that a c[lass of] persons is likely to consider such destruction, etc , as an insult to their r[eligion]

1 **'Whoever destroys, damages or defiles any place of worsh[ip or] any object held sacred by any class of persons'** —Any person, whe[ther a] worshipper in the place or not, comes within the purview of this section [by the] use of the word 'whoever'

'Defiles'.—The word 'defile' is not to be restricted in meaning to ac[ts that] would make an object of worship unclean as a material object but extends [to acts] done in relation to the object of worship which would render such object [ceremonially] impure[2] "The words 'destroy' and 'damage' have obviously a phys[ical and] material signification, and on the usual principle of construction of *ejusdem* [generis] a similar meaning is to be assigned to the word 'defile' 'Defile' itself is [a word] of hybrid origin, but the main root 'file', 'foul', is English and it may ordin[arily be] understood especially in collocation with such words as 'destroy' and 'dam[age' in] the primary physical sense"[3]

This word does not include animate objects according to the Allahab[ad and] Calcutta High Courts but refers only to inanimate objects such as ch[urches,] mosques temples and marble or stone figures representing gods[4] The kn[...]

1 Note J., p 136.
2 P... ...

I U B P (1892 1896) 199 200

PRACTICE.

Evidence.—Prove: (1) That the accused had kept an office or place.
(2) That such office or place was used for the purpose of drawing a lottery.
(3) That such lottery was not authorised by Government.
For the second part of the section prove:
(1) That the accused published the proposal in question.
(2) That the nature of such proposal was to pay, etc., on an event or contingency as described in the section.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

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Injuring or defiling place of worship, with intent to insult the religion of any class

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons[1] with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT

This section punishes the injury or defiling of a place of worship with intent to insult the religion of a class of persons Intention is the gist of the offence under it Mere defilement of a place of worship is not enough

Ingredients.—The section requires two essentials —

1 Destruction, damage, or defilement of (*a*) any place of worship, or (*b*) any object held sacred by a class of persons

2 Such destruction, etc , must have been done (*i*) with the intention of insulting the religion of a class persons, or (*ii*) with the knowledge that a class of persons is likely to consider such destruction, etc , as an insult to their religion

1. 'Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons'.—Any person, whether a worshipper in the place or not, comes within the purview of this section by the use of the word 'whoever

'Defiles'.—The word 'defile' is not to be restricted in meaning to acts that would make an object of worship unclean as a material object, but extends to acts done in relation to the object of worship which would render such object ritually impure[2] "The words 'destroy' and 'damage' have obviously a physical or material signification, and on the usual principle of construction of *ejusdem generis* a similar meaning is to be assigned to the word 'defile' 'Defile' itself is a word of hybrid origin, but the main root 'file', 'foul', is English, and it may ordinarily be understood, especially in collocation with such words as 'destroy' and 'damage', in the primary physical sense"[3]

This word does not include animate objects according to the Allahabad and Calcutta High Courts, but refers only to inanimate objects such as churches, mosques, temples and marble or stone figures representing gods[4]. The killing of

[1] Note J, p 136

[2] Per Muttusami Aiyar, J, in *Siralo[illegible]* [illegible]

1 U B R (1892-1896) 199, 200

[4] *Imam Ali*, (1887) 10 All 150, F B, *Romesh Chunder Sannyal* v *Hiru Mondal*, (1890) 17 Cal 852, *Ali Muhammad* (1917) P R No 10 of 1918 F B, overruling *Hakim*, (1884) P R No 27 of 1884

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Injuring or defiling place of worship with intent to insult the religion of any class.

295 Whoever destroys damages or defiles any place of worship or any object held sacred by any class of persons[1] with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both

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Ingredients —The section requires two essentials —

1 Destruction damage or defilement of (a) any place of worship or (b) any object held sacred by a class of persons.

2 Such destruction etc must have been done (i) with the intention of insulting the religion of a class persons or (ii) with the knowledge that a class of persons is likely to consider such destruction etc as an insult to their religion

1 **'Whoever destroys damages or defiles any place of worship, or any object held sacred by any class of persons**.—Any person, whether a worshipper in the place or not comes within the purview of this section by the use of the word whoever

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This word does not include animate objects according to the Allahabad and Calcutta High Courts, but refers only to inanimate objects such as churches mosques temples and marble or stone figures representing gods[4] The killing of

[1] Note J., p. 150.

[2] Per Muttusami Ayyar, J., in Sundram Swami (1886) I Weir 233 Bawani Gowda [illegible] (1891) I Weir 235 Kunhikrishnan [illegible] Rama Pothar (1919) 41 Mad. [illegible]

[3] Per Burgess, J C., in Vyas Pd Sao, (1934) I U. B. R. (1934) 100 [illegible].

[4] Imam Ali, (1887) 10 All. 150 F.B.; Fatesh Chadar Sarkar v Emp. [illegible] (1921) [illegible] Cal. 822 Ali Mahomed, (1917) P. R. No. 1 of 1918 F.B., overruling [illegible], (1914) P. R. No. [illegible] of 1915.

attached to doctrines and its rites which Christians and Mahomedans join in reprobating Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration On those principles the British Government has hitherto acted with eminent judgment, and with no less eminent success, and on those principles we propose to frame this part of the Penal Code"[1].

Under this section it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons This intention could be ascertained from the nature of the act done Where there is no intention to wound the religious susceptibilities there will be no offence Where a person, as the result of a quarrel with a relation, threw a basket containing

intention of wounding

have committed an

re charged under this

section, in that they removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Mahomedans They were acquitted on the finding that the mosque was, at any rate its roof was, in a rotten condition, and that no one had any particular claim to it The complainant applied to the High Court for revision It was held that there was no reason to believe that the defendants, in acting as t religion of the Mahomedan residents of the knowledge that any class of persons he materials an insult to their religion[3] Where a Hindu had sexual intercourse with a woman secretly and at night within an enclosure surrounding the tomb of a Mahomedan fakir, it was held that he had committed an offence under s 297 and not under this section[4] Where the accused, a goldsmith by caste, performed certain ceremony by pouring cocoanut water over the idol of god Shiva, it was held that if the temple in which the ceremony was performed was one of a class in which the worshippers were not allowed to touch the idol or pour cocoanut water on it except through persons specially appointed for the purpose, and bound to observe certain special rules, and if the accused performed the cere the established rule, a conviction under presence of Moothans, a sub caste of Sudr

iple and

Place of worship.—A *kyaung* is a place of worship[8] Where the acc who were of low caste, entered into the precincts of a temple, it was held th unless there was an intention to insult the religion of a class of persons they c not be convicted of an offence under this section[9]

PRACTICE.

Evidence.—Prove (1) that the place was one of worship or that the object was a sacred one

(2) That the same was held sacred by a class of persons

(3) That the accused destroyed, damaged, or defiled the same

(4) That he did so (*a*) with the intention of thereby insulting the religion of a class of persons, or (*b*) with the knowledge that a class of persons is likely to consider such destruction, etc, as an insult to their religion

[1] Note J, p 136.

[2] *Waman Lakshman*, (1898) Unrep Cr C. 973

[3] *Jan Muhammad v Narain Das*, (1883) 3 A W N 39

[4] *Ratna Mudali*, (1886) 10 Mad. 126.

[5] *Sivakoti Swami*, (1885) 1 Weir 253 See *Ratna Mudali*, sup

[6] *Kuttichami Moothan v. Rama Pattar*, (1918) 41 Mad. 980

[7] *Atma Ram*, (1923) 25 Cr L. J 155

[8] (1894) 1 U B R. (1892 1896) 198.

[9] *Mt. Zirgoo*, (1893) 7 C. P L. R. (Cr) 45.

ments are also proposed in the Code of Criminal Procedure in pursuance of the object of the Bill"[1]

1. **'Whoever'.**—See Comment on s. 124, *supra.*

2. **'Deliberate and malicious intention'.**—See Comment on s 298 as to the meaning of 'deliberate intention'

The word 'maliciously' is used in s 219, *supra* See Comment on that section.

"Further, we were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted

words 'with deliberate intention' by inserting reference to malice, and we think that the section which we have now evolved will be both comprehensive and at the same time of not too wide an application"[3]

3. **'Outraging the religious feelings'.**—Section 298 uses the word 'wounding' this section uses the word 'outraging' 'Outraging' is a much stronger word than 'wounding' In Murray's Dictionary 'outrage' is explained as "to wrong grossly, treat with gross violence or indignity" The Select Committee in their report stated.

outrage upon

for the cases

the same time, we realize that the reference to the outraging of religious feelings

We have therefore provided that the new section shall only apply in cases where a religion is insulted with the deliberate intention of outraging the religious feelings of its followers"[4]

4. **'Class'.**—See Comment on s 153A, *supra*

5. **'Written'.**—See Comment on s 124A, *supra*

6. **'Visible representations'.**—See Comment on s 124A, *supra.*

7. **'Attempts'.**—See Comment on s 124A, *supra.*

8. **'Religious beliefs'.**—The Select Committee in their report stated that "to make it clear that an attack on a founder is not omitted from the scope of the section, we have specifically made punishable an insult to the 'religious beliefs' of

[1] *Gazette of India* dated August 20, 1927, Part V, p 213

[2] *Gazette of India*, dated September 17, 1927, Part V, p 251

[3] *Gazette of India*, dated September 17, 1927, Part V, pp. 251-52

[4] *Gazette of India* dated September 17, 1927, Part V, p. 251

[5] *Gazette of India*, dated September 17, 1927, Part V, p 251

would fall under s. 295A. There is a further reference to God, who according to the Mahomedan religion, is a celibate, having given permission to Mahomedan males to have as many as four wives to boot and have as many non-Mahomedan women as they like and other liberties with regard to women. I agree with the Sessions Judge as regarding this as insulting to the Mahomedan religion and if the insult is malicious and deliberate with the intention of outraging the feelings of Mahomedans the publication would be an offence under s. 295A"[1].

Power to prevent religious disorders.—Under s. 42 (1) of the Bombay District Police Act (IV of 1890) the District Magistrate or First Class Magistrate has power to stop harangues or dissemination of pictures, symbols, mimic representations which may inflame religious animosity or hostility between different classes. Under the City of Bombay Police Act (IV of 1902), s. 23 (2) (*c*), the Commissioner of Police is invested with similar powers.

Confiscation.—The Local Government is empowered under s. 99A, Criminal Procedure Code, to forfeit any newspaper, book, or document which is deliberately and maliciously intended to outrage the religious feelings of any class of His Majesty's subjects by insulting the religion or the religious beliefs of that class.

PRACTICE.

Evidence.—Prove (1) that the accused spoke or wrote the words or made the visible representations.

As to evidence of publication see Comment on s. 124A.

(2) That the accused thereby insulted or attempted to insult the religion or the religious beliefs of a class of His Majesty's subjects.

(3) That the accused did so with the deliberate and malicious intention of outraging the religious feelings of that class.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Presidency Magistrate.

The Select Committee in their report stated: "We desire (to observe that by the reference to a Court of Session we mean a Court of Session sitting with assessors"[2].

Sanction.—Sanction of Government is necessary for prosecution under this section[3]. The Select Committee in their report stated: "We are of opinion that a provision requiring this sanction of Government to the institution of a prosecution under this section is necessary in order to avoid fictitious or vindictive proceedings which would not be likely to result in a conviction"[4].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of———, at——, by writing (*or* speaking,) the words (*mention them*) (*or* by visible representations, viz.——) insulted (*or* attempted to insult) the religion (*or* the religious beliefs) of a class of His Majesty's subjects, to wit——, with the deliberate and malicious intention of outraging the religious feelings of that class, and thereby committed an offence punishable under s. 295A of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*when tried by a Presidency Magistrate omit these words*]) on the said charge.

[1] Per Baker, J., in *Ambalal Paragji*, (1929) Cri. Appeals Nos. 17 and 18 of 1929, decided by Patkar and Baker, JJ., on April 12, 1929 (Unrep.)

[2] *Gazette of India*, dated September 17 1927, Part V, p. 252.

[3] Criminal Procedure Code, s. 196.

[4] *Gazette of India*, dated September 17, 1927, Part V, p. 252.

296 Whoever voluntarily causes disturbance[1] to any assembly lawfully engaged in the performance of religious worship[2], or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Disturbing religious assembly

COMMENT.

Assemblies held for religious worship or for the performance of religious ceremonies are hereby protected from intentional disturbance

Ingredients —The section has the following essentials —

1 Causing of disturbance voluntarily

2 The disturbance must be caused to an assembly lawfully engaged in religious worship or religious ceremonies

1 **'Voluntarily causes disturbance'** —See s 39, *supra* Under this section proof of intention is unnecessary as the Code supposes an intention to insult if the disturbance, in fact, follow immediately as the result of the offender s act Assemblies lawfully engaged in the performance of religious worship or religious ceremonies are hereby protected from voluntary disturbance and insult be that religion true or false

To constitute a 'disturbance within the meaning of this section a religious service need neither be stopped nor actually prevented from being carried on, nor need a religious assembly be really disturbed[1] The word disturb' means molest' or 'vex' Peaceful worship must not be interfered with Where one party could hear little or nothing of what the other recited, it was held that no disturbance was caused within the meaning of this section'[2] Where the accused spread false rumours which caused a religious procession to come to an end, it was held that they could not be convicted of causing disturbance within the meaning of this section[3].

2 **'Lawfully engaged in the performance of religious worship'.**—The assembly must have been lawfully engaged in the performance of such worship or ceremonies, i e, they must be doing what they have a right to do[4] If the ceremony is commenced by an act which is not lawful, it cannot be said that the persons engaged in it are lawfully engaged from the mere circumstance of their falling [illegible] worship may be real[5]

[illegible] street or thoroughfare, so as to cause obstruc[illegible] engaged' within the meaning of this section In a Full Bench case Subrahmania Ayyar, J, said 'The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in the assembly exclusively, and not when they engage in worship [illegible] roughfare The user of a highway [illegible] ulness Bhashyam Ayyangar, J, [illegible] Benson, JJ, while agreeing that no disturbance was caused by the accused in the case before them, did not share the same view as Subrahmania Ayyar and Bhashyam Ayyangar, JJ, did as to the lawfulness of religious worship on the highway[6] The former Chief Court of the Punjab adopted the view of Subrahmania Ayyar and Bhashyam Ayyangar, JJ.

1 *Selvarajalu Naiker* (1889) 1 Weir 259

2 *Vijiaraghava Chariar* (1903) 26 Mad. 554 F B

3 *Mohammad Husain* (1919) 17 A. L. J 820.

4 *Jaipal Gir v H Dharmapala* (1895) 23 Cal 60 *Ram am* (1895) 7 All 461 474, F B.

5 *Jaipal Gir v H Dharampala Ibid.*

6 *Vijiarahgava Chariar*, sup.

Where some boys were beating drums to summon people for joining a Moharram procession and on being asked by the accused, whose horse was frightened, they did not stop, and the accused then seized the drums, but restored them the next day, it was held that the accused's acts did not constitute an offence under this section, inasmuch as no assembly could be "lawfully engaged" within the meaning of this section on a highway[1]. But where certain Lodhas, who, with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession, it was held that such attack constituted a disturbance to the performance of a religious ceremony[2].

The worship must be a real worship and not a cloak for doing something else, and the assembly must be lawfully engaged in worship[3].

CASES.

Disturbance caused by saying 'amin'.—A mosque was used by the members of a sect of Mahomedans called the Hanifis, according to whose tenets the word 'amin' (amen) should be spoken in a low tone of voice. While the Hanifis were at prayers, R, a Mahomedan of another sect, entered the mosque, and in the course of the prayers according to the tenets of his sect, called out "amin" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship under this section. The Allahabad High Court ordered the case to be re-tried[4]. But in a subsequent case it was held that a mosque is a place where all sects of Mahomedans are entitled to go and perform their devotions as of right, according to their conscience; and a Mahomedan pronouncing the word 'amin' loudly, in the honest exercise of conscience, commits no offence or civil wrong[5], though he may by such conduct cause annoyance to his fellow-worshippers in the mosque[6]. Any person, Mahomedan or not, who goes into a mosque not bona fide for a religious purpose but mala fide, for the purpose of disturbing others engaged in their devotions, will render himself criminally liable[7].

Disturbance caused by saying 'mantra'.—Where the worshippers were reciting one *mantram* (precept from a religious work) and the accused recited another *mantram* in their presence and hearing, so as to distract the minds of the former from the act in which they were engaged, it was held that the act of the accused amounted to a disturbance of religious worship within the meaning of this section. To constitute the offence, it is not necessary that there should be an actual stay or interruption of the service[8].

Disturbance caused by music.—Where the accused passed in procession before a mosque with music while religious worship was going on between certain hours which, to the knowledge of the accused, were fixed for such worship by the District Magistrate, it was held that the accused by their action disturbed the worship and were guilty under this section, and that it was not necessary that the accused should have had an active intention to disturb religious worship, if knowing they were likely to disturb it by their music they took the risk and did actually cause disturbance[9].

English case.—Where in a contest for situation of a clerk to a meeting house, one clerk pulled the other from the desk, it was held to be a disturbance, although the statute prohibiting disturbance was intended principally to apply to persons who would oppose a form of worship inconsistent with their own tenets[10].

1 *Dhalu Ram*, (1909) P. W. R. (Cr.) No. 33 of 1909.
2 *Masit*, (1911) 34 All. 78.
3 *Jaipal Gir* v. *H. Dharmapala*, (1895) 23 Cal. 60.
4 *Ramzam*, (1885) 7 All. 461, F.B.
5 *Ata-ullah* v. *Azim-ullah*, (1889) 12 All. 494, F. B. See *Fazul Karim* v. *Haji Mowla Buksh*, (1891) 18 I. A. 59; *Moulvie Abdus-Subhan* v. *Kurban Ali*, (1908) 12 C.W.N. 289.
6 *Jangu* v. *Ahmad Ullah*, (1889) 13 All. 419, F. B.
7 *Ibid.*
8 *Krishnatatachari*, (1884) 1 Weir 259.
9 *Sunku Seethiah*, (1910) 34 Mad. 92.
10 *Hube*, (1792) 5 T. R. 542.

PRACTICE

Evidence.—Prove (1) the existence of the assembly in question

(2) That such assembly was at the time of the offence, engaged in performing religious worship or ceremony

(3) That the assembly being engaged in such performance was lawful

(4) That the accused caused disturbance of such assembly when so engaged

(5) That the accused did as above voluntarily

It is not necessary that the accused should have had an active intention to disturb religious worship If he knew that he was likely to disturb it it is sufficient[1]

Procedure —Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class

Charge —I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at—— voluntarily caused disturbance to an assembly, to wit—— lawfully engaged in the performance of

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge[1] that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted[2] thereby,

Trespassing on burial places, etc

commits any trespass[3] in any place of worship[4] or on any place of sepulture[5], or any place set apart for the performance of funeral rites[6] or as a depository for the remains of the dead, or offers any indignity to any human corpse[7], or causes disturbance to any persons assembled for the performance of funeral ceremonies[8],

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

COMMENT

Object —The section deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead It extends the principle laid down in s 295 to places which are treated as sacred

The offence at which it strikes is intimately bound up with the commission of a trespass or subject to that of deliberately offering an indignity to a corpse or causing disturbance to a body of persons assembled for religious purposes[1]

1. 'Intention knowledge' —The essence of this section is an intention, or knowledge, of likelihood to wound feelings or insult religion, and when with that intention or knowledge trespass on a place of sepulture indignity to a corpse, or disturbance to persons assembled for funeral ceremonies is committed, the offence is complete[2] Where owing to a dispute between the parties a delay

[1] *Sunku Seethiah* (1910) 34 Mad. 92   L. J 160
[1] *Mustaffa Rahim v Motilal* (1909) 10 Cr   [2] *Burhan Shah*, (1887) P R No 26 of 1887

occurred in digging a grave, and the corpse was not present, it was held that this section was not applicable[1]. The section "does not make an act committed in defiance of it an offence when that act is committed with the intention of wounding the feelings of any person; it is equally an offence if committed with the knowledge that the feelings of any person are likely to be wounded or the religion of any person is likely to be insulted thereby"[2]. Persons who entered upon a burial place and ploughed up the graves were held to have committed an offence under this section, notwithstanding that their entry on the land was by the consent of the owner thereof[3]. Where the accused, who formed part of a committee whose duty it was to collect subscriptions to defray the cost of erecting a wall round a cemetery, stopped a corpse at the gate and demanded a fee before admitting it into the cemetery, and some discussion ensued during which the corpse was placed on the ground, but the party bearing the corpse were then admitted without payment, it was held that there was no indignity within the meaning of this section[4]. Four co-owners of a plot of land used to bury their dead in that land. Two of them opened a saw-pit close to the graves of a third co-owner's relatives but did not disturb any of the graves. It was held that they had not committed any offence under this section[5].

2. **'Likely to be insulted'.**—An act which is done with the knowledge that a person is likely to consider that act as an insult to his religion, is an act by which 'religion is likely' to be insulted within the meaning of this section.

3. **'Trespass'.**—The word 'trespass' here implies not merely criminal trespass as defined in s. 441, but also an ordinary act of trespass, i.e., an entry on another's land without lawful authority with the intention specified in the section. The Allahabad High Court has laid down in two cases that the word 'trespass' in this section has not the same meaning as that in the expression 'criminal trespass' defined in s. 441. Knox, J., in a case said: "I am not prepared to construe the word 'trespass' in the present section as it is defined in the case of criminal trespass under the Penal Code. In a section of this kind I see no reason for restricting the original meaning of the word, which covered any injury or offence done, and to couple it with entry upon property"[6]. The Calcutta High Court has similarly observed that the word 'trespass' in this section means "any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section"[7].

In a case before the former Chief Court of the Punjab one Judge expressed his agreement with the Allahabad and Calcutta view, but another Judge did not agree with it[8]. In an unreported case the Bombay High Court has laid down that the 'trespass' contemplated in this section is such a trespass as is defined in s. 441.

The Rangoon High Court has held that the word 'trespass' means any violent or injurious act committed in such place and with such knowledge or intention as is defined in this section. The accused, who had gone to the mosque for prayers, was asked after the service, by some others why he had on former occasions abused the Moulvi and the congregation, and on his denial, an altercation ensued, when the accused abused all and sundry employing obscene epithets and threats. It was held that in order to convict the accused, it must be proved that he, with the intention of wounding the feelings of the Moulvi and the congregation, remained

1 *Burhan Shah*, (1887) P. R. No. 26 of 1887.
2 Per Knox, J., in *Subhan*, (1896) 18 All. 395.
3 *Ibid.*
4 *Hajee Mahamed Ghouse Sahab*, (1903) 1 Weir 287.
5 *Khaja Mahomed Hamin Khan*, (1881) 3 Mad. 178.
6 *Subhan*, sup.
7 Per Richardson, J., in *Jhulan Sain*, (1913) 40 Cal. 548, 551.
8 *Umar Din*, (1915) P. R. No. 23 of 1915.

unlawfully within the mosque with intent thereby to insult or annoy them and that on the facts a conviction under this section was wrong[1]

Where a joint owner of property entered a grave for the purpose of demarcating his share and in doing so dug up certain graves, and exposed the bones of the persons buried in spite of the remonstrances of the relations of the buried persons, it was held that he had committed an offence under this section[2] Similarly, the erection of a shed over a visible grave belonging to the complainant's family in a disused grave yard claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, was held to be an offence under this section[3] The accused dug up and

[illegible]

be wounded was wrongful and amounted to a trespass, no matter whether the land in which the place of sepulture was included did or did not belong to such person[4]

4. 'Place of wo[illegible]
with the knowledge
Where a *mahar*, a low
was committed[6] A Hindu, who had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan *fakir* was convicted under s 295 It was held that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under this section[7]. Persons having sexual connection inside a mosque are guilty of an offence under this section[7].

5. 'Place of sepulture' —Trespass on any place of sepulture comes within the purview of this section But where there have been only a few isolated and secret cases of burial in the course of many years on a piece of property, that would not be enough to constitute it a place of sepulture within the meaning of the section

6. 'Funeral rites'.—The section contemplates disturbance of persons engaged in performing funeral ceremonies Obstruction to the performance of obsequies comes under this section[9] But a Moharram procession is not a funeral ceremony within the meaning of this section[10].

7. 'Offers any indignity to any human corpse.'—Where certain persons were convicted of having offered an indignity to a human corpse, inasmuch as they had by using their influence prevented the grave diggers from digging a grave for the corpse of the complainant's son, on account of the complainant not having joined the Khilafat party, it was held that the accused had not committed any criminal offence Stuart, J, observed "I do not propose to expatiate upon the mentality of persons, who, to support their views as to what they conceive desir-

[illegible]

1 *Mustan* (1923) 1 Ran 690
2 [illegible] 1911 [illegible] All [illegible]
3
4
5
6 1911
7 *Ratna Mudali*, (1886) 10 Mad 126, *Agi* [illegible]

Po San, (1894) 1 U B R. (1892 1896) 199, *Gaya* (1882) 5 C P L. R (Cr) 32
8 *Maqsud Husain*, (1923) 45 All 529
9 *Subramania Ayyan* v *Venkata Rayar*, (1883) 6 Mad 234 237
10 *Ghosta* v *Kalka* (1885) 5 A W N
11 *Amanat* (1921) 20 A L J 93 94

8. **'Causes disturbance to any persons, etc.'**—The word 'disturbance' implies some active interference in, or hindrance to, the performance of the funeral ceremonies. The grand-daughter-in-law of the complainant having died, the complainant and his relation took the body out to the cremation ground and were preparing to cremate it when the accused came there and asked them not to cremate the body, and on being asked why, said that they would state the reason to the police. It was held that the mere utterance of the words "do not cremate the body," unaccompanied by any attempt to prevent the cremation or by any manifestation on the part of the accused of their intention to interfere if the complainant and his relations should persist in having the body cremated, could not be regarded as a disturbance to the persons assembled for the performance of the funeral ceremonies within the meaning of this section[9].

PRACTICE.

Evidence.—Prove (1) that the place in question was (*a*) a place of worship; or (*b*) a place of burial, etc.

(2) That the accused committed trespass therein.

(3) That he did so (*i*) intending thereby to wound the feelings of some person, or to insult the religion of some person; or (*ii*) with the knowledge that the feelings of some person would be likely to be wounded thereby, or that the religion of some person would be likely to be insulted thereby.

Or prove the following points:—

(1) The existence of the human corpse.

(2) That the accused offered an indignity thereto.

(3) That he, when offering such indignity, intended or knew, etc., as in (3) above.

Or prove the following points:—

(1) That persons were assembled for performing funeral ceremonies.

(2) That the accused caused disturbance to such persons when assembled.

(3) That he did so intending thereby, or knowing, etc., as in (3) above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, with the intention of wounding the feelings of—— (*or* of insulting the religion of——) [*or* with the knowledge that the feelings of——are likely to be wounded (*or* that the religion of—is likely to be insulted thereby)] committed a trespass in a place of worship, to wit——, (*or* on a place of sepulture, to wit——, *or* etc.), and thereby committed an offence punishable under s. 297 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Uttering words, etc., with deliberate intent to wound religious feelings.

298. Whoever, with deliberate intention of wounding the religious feelings[1] of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[1] *Mangat*, (1918) P. R. No. 2 of 1919.

COMMENT.

Object.—The authors of the Code say· "In framing clause 282 (this section), we had two objects in view we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture or exhibition
argument urged by
fessors of a different
will not fall under the definition contained in this clause"[1].

1. 'Deliberate intention of wounding the religious feelings'.—The Law Commissioners observe "The intention to wound must be *deliberate*, that is, not conceived on the sudden in the course of discussion, but premeditated, it must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him In other
... causing
... act was
... uttering
... hat they
... that he
... rther his
argument— ... in pursu
ance of a ... to con-
viction und ... e himself
upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer"[2].

"We are, though not without hesitation, inclined to think that in the very
...
the same thing by contemptuous or vituperative language is an offence which would be severely punished in practice But the reason is that conversion is not recognised as a legitimate object The law assumes the truth of Christianity.
...
possible to convert a sincere or ardent votary of any faith without wounding his religious feelings in the early stages of the process'[4]

Deliberate intention of the accused may be inferred from his words as well as from his acts

[1] Note J, p 137
[2] 2nd Rep, s 252
[3] *Ibid* s. 254
[4] *Ibid* s. 255

CASES.

Deliberate intention to wound religious feelings.—Interpolation of a forbidden chant.—Interpolation of a forbidden chant in an authorized ritual is an offence under this section[1].

Exhibiting cow's flesh.—Exhibiting cow's flesh by carrying it in an uncovered state round a village with the deliberate intention of wounding the religious feelings of Hindus is an offence under this section[2]. But it has been held that religious feelings of Mahomedans are not wounded by the slaughter of goats by *jhatka* and exposing the carcass outside or selling its flesh inside a shop, as Mahomedans do not worship goats[3].

No offence if religious feelings are not wounded.—Swearing on cow's flesh.—Where the accused, while his caste-people were sitting to dine at the complainant's house, called out in the hearing of all that they would be eating cow's flesh if they took food without them, which made them leave their dishes untouched, it was held that the accused could not be convicted under this section[4].

Wilful pollution of food served at a caste dinner.—Where certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and after telling those who were seated to move to another place, which they refused to do, threw down a shoe amongst the men who were seated, and who in consequence left the food untouched, it was held that the persons who threw the shoe could not be convicted under this section[5]. This decision does not seem to be satisfactory. The authors of the Code have said that "the rendering the food of a Hindoo useless to him by causing it to be in what he considers as a polluted state is an injury" necessitating punishment[6].

Throwing dirty clothes.—Where a woman threw a cloth, which she had been wearing at the time of her confinement after having given birth to an illegitimate child, on a person whom she alleged to be its father, it was held that that did not amount to an offence under this section as it deals with offences relating to religion and not to castes[7].

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the gesture, etc.

(2) That he did so, intending to wound the religious feelings of any person.

(3) That such intention was deliberate.

To hold a person liable under this section the intention with which the words were uttered must be strictly proved; and it is not sufficient to show that the utterer knew that his act was likely to wound the religious feelings of any body[8].

"It is not sufficient for conviction that a person should do one of the acts described with the knowledge that he is thereby likely to wound the religious feelings of any person, nor even that he should do it with that intention, unless the intention be deliberate"[9].

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Magistrate, Presidency, or first or second class.

1 *Narasimha* v. *Shree Krishna,* (1892) 2 Mad. Jur. 236.
2 *Rahman,* (1893) 13 A. W. N. 144.
3 *Kirpa Singh,* (1897) P. W. R. (Cr.) No. 26 of 1912.
4 *Dagadi,* (1892) Unrep. Cr. C. 592.
5 *Moti Lal,* (1901) 24 All. 155.
6 Note J, p. 137.
7 *Tukaram* v. *Zeli,* (1892) 6 C. P. L. R. 7.
8 *Narasimha* v. *Shree Krishna,* sup.
9 Per Plowden, J., in *Hubibullah,* (1889) P. R. No. 4 of 1890.

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, uttered the word (*specify it*) in the hearing of——[*or* made a sound, to wit——, in the hearing of——, *or* made a gesture, to wit——, [illegible]
wit——, in the sight of——
feelings of the said person,
s 298 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

THE following offences affect the human body, viz.:—

1. Unlawful homicide.
   (a) Culpable homicide.
   (b) Murder.
   (c) Homicide by rash or negligent act.
   (d) Suicide.
2. Causing miscarriage.
3. Exposure of infants and concealment of births of children.
4. Hurt.
   (i) Simple.
   (ii) Grievous.
5. Wrongful restraint and wrongful confinement.
6. Criminal force.
7. Assault.
8. Kidnapping.
9. Abduction.
10. Slavery and forced labour.
11. Rape.
12. Unnatural offence.

Of Offences affecting Life.

Culpable homicide.

299. Whoever causes death[1] by doing an act[2] with the intention of causing death[3], or with the intention of causing such bodily injury as is likely to cause death[4], or with the knowledge that he is likely by such act to cause death[5], commits the offence of culpable homicide.

ILLUSTRATIONS.

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act that he knew was likely to cause death.

Explanation 1[6].—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2[7].—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3[8].—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

COMMENT.

This section ‹ f causing death with one of three intentions, injury as is likely to cause death, or doing s to be likely to cause death

Homicide.—Homicide is the killing of a human being by a human being[1]. It is either (A) lawful, or (B) unlawful

Lawful homicide, or simple homicide, includes several cases falling under the General Exceptions (Ch IV)

Unlawful homicide includes (1) culpable homicide not amounting to murder, (2) murder (s 300), rash or negligent homicide (s 304A), and (4) suicide (ss 305, 306)

(A) **Lawful or simple homicide.**—This may be divided into two classes—

1. **Excusable homicide** —This class includes the following cases —

(1) Where the death is caused by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means, and with proper care and caution (s 80)

(2) Where the death is caused by a child, or a person of unsound mind, or an intoxicated person, as will come under ss 82, 83, 84 and 85

(3) Where the death is caused unintentionally by an act done in good faith for the benefit of the person killed, when

(i) he or, if a minor or lunatic, his guardian has expressly or impliedly consented to such an act (ss 87, 88), or

(ii) where it is impossible for the person killed to signify his consent, or where he is incapable of giving consent, and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (s 92)

All the above cases are dealt with in the General Chapter of Exceptions

2. **Justifiable homicide.**—This class includes cases where the death is caused—

(1) By a person, who is bound, or by a mistake of fact, in good faith, believes himself, bound, by law (s 76)

(2) By a Judge when acting judicially in the exercise of any power which is or which in good faith he believes to be, given to him by law (s 77)

(3) By a person acting in pursuance of the judgment or order of a Court of Justice (s 78)

(4) By a person who is justified or who by reason of a mistake of fact, in good faith, believes himself to be justified by law (s 79)

(5) By a person acting without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property (s 81)

(6) Where the death is caused in exercising the right of private defence of person or property (ss 100, 103)

(B) **Unlawful homicide** —Culpable homicide is the first kind of unlawful homicide

(i) death,

(ii) such bodily injury as is likely to cause death, or

(iii) an act with the knowledge that the act was likely to cause death

Without one or other of these elements an act, though it may be in its nature criminal and may *occasion death, will not amount to the offence of* culpable homicide[2]

The existence of an evil motive is not at all necessary Malice is not made a necessary ingredient of the definition Whatever may be the motive which

[1] Stephen's Dig of Cr L., Art 239 [2] *Rakee*, (1866) Unrep Cr C C

incites the action and whether or not any motive whatsoever be discoverable, if the act falls within any of the above elements, and none of the General Exceptions (Ch. IV) is applicable, it is culpable homicide.

English law.—Manslaughter is the unlawful killing of another without malice aforethought, express or implied. It is of two kinds: (1) Voluntary; (2) Involuntary.

(1) Voluntary manslaughter: where a man greatly provokes another, and the other kills him; or where, upon a sudden quarrel, two persons fight and one of them kills the other.

These two cases are met with by exceptions (1) and (4) to s. 300.

(2) Involuntary manslaughter: where death is caused by accident in doing an unlawful act not amounting to felony; or where death is caused by culpable neglect, i.e., while doing a lawful act in an unlawful manner.

The first case will not be culpable homicide under the Code as will appear from ill. (*c*) to this section; and the second case is separately provided for by s. 404A.

Under the English law, it is neither murder nor manslaughter unless the death takes place within a year and a day from the blow or other cause. If the deceased died after that time, the law would presume that his death had proceeded from some other cause[1]. This rule is not adopted in the Code[2].

1. 'Whoever causes death'.—'Death' means the death of a human being (s. 46). The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of the child has been brought forth, though the child may not have breathed or been completely born[3]. Under the English law complete emergence of the child from the womb is necessary before it is recognized as a human being. It is immaterial if the person whose death has been caused is not the very person whom the accused intended to kill (see ill. (*a*) and s. 301). The offence is complete as soon as any person is killed. The Madras High Court has held, though not unanimously, that it is sufficient for the purpose of this section if criminal intention or knowledge on the part of the accused existed with reference to any human being, though the death of the person who actually fell a victim to the accused's act was never compassed by him. All that the section requires is, that there should be an intention to cause death or knowledge that death is likely to be the result, and there is nothing in the section which necessitates that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. Illustration (*a*) makes it quite clear that the legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused, by the act of the accused, was not the person intended to be killed by him, but some other person. In this case the accused wanted to kill a person on whose life he had effected large insurances, and to secure his object gave him some sweetmeat (*halva*) in which he had mixed arsenic and mercury in a soluble form, to eat. The man ate a portion of the sweetmeat at the house of the accused's brother-in-law, but not liking its taste, threw away the remainder on the spot. A daughter of the accused's brother-in-law picked up the sweetmeat without the knowledge of the accused, ate a portion of it herself, and gave some to another child who also ate it. The two children who had eaten the poisonous sweetmeat died from the effects of it, but the intended victim survived after considerable suffering. It was held by Benson and Abdur Rahim, JJ., (Sundara Aiyar, J., dissenting) that the accused was guilty of murder. Benson, J., said: "The section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he 'causes

1 1 Hawk. P. C., c. 31, s. 9; 1 East P. C. 344.

2 1st Rep., ss. 327, 330.

3 *Vide* Explanation 3.

the death' of any one by doing an act with the intention of 'causing death' to anyone, whether the person intended to be killed or anyone else This is clear from the first illustration to the section Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration. The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu (the accused) in throwing away part of the sweetmeat, nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl s death"[1]

2. **'By doing an act'.**—None of the endless variety of modes by which human life may be cut short before it becomes in the course of nature extinct, is excluded Death may be caused by poisoning, starving, striking, drowning, and by a hundred different ways

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necessar

to the preservation of life They are as follows —A duty in certain cases to pro-
vide the necessaries of ... ful manner, and
to employ reasonable ... a duty to take
proper precautions in ... to do any act
undertaken to be done ... which would be

person employed in a mine to keep the doors regulating the ventilation open or shut at proper times To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability".

The authors of the Code say "When acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce, certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce, the same evil effects to be made punishable ?

"Two things we take to be evident, first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished, secondly, that all these omissions ought not to be punished It will hardly be disputed that a gaoler who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant intrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder On the other hand, it will hardly

1 *Suryanarayana Murthy* (1912) 22 M. L. J. 333, 336, 337, [1912] M. W. N 138, 11 M. L. T 127

2 History of Criminal Law, Vol III, p. 10.

be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

"It is plain, therefore, that a middle course must be taken: but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include...

"What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause, a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, the same effect shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it is an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

"We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's gaoler, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had therefore a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z was a bedridden invalid, and A a nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and had thus contracted (see clause 338) a legal obligation to furnish Z, during the continuance of the confinement, with necessaries. It is not murder if Z is a beggar, who has no other claim on A than that of humanity.

"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (Clause 273). But if A be a mere passer-by, it is not murder"[1].

It will, therefore, appear that if death is caused—

(*i*) by an illegal omission with the intention that such omission should cause death;

(*ii*) by an illegal omission with the intention that such omission should cause such bodily injury as is likely to cause death;

(*iii*) by an illegal omission with the knowledge that death is likely to be the result of such omission;

1 Note M. pp. 133, 139, 140.

it will be culpable homicide

See cases under s 300 relating to neglect to supply medical aid or food.

Death caused by the effect of words on the imagination or the passions.—The authors of the Code say The reasonable course, in our opinion, is to consider homicide, if by erated circuitous convulsions f any Court that death had really been the effect of excitement produced by words, it would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce Still it seems to us that both these points might be made out by overwhelming evidence, and, supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword Suppose it to be proved to the entire conviction of a criminal Court that Z, the deceased, was in a very critical state of health that A the heir to Z s property, had been informed by Z s

boasted of having cleared the way for himself to a good property by this artifice these things being fully intarily caused the death of Z nor do in the same manner in which he wc arsenic in Z s medicine [1]

ings to Z, w A has coc

(c) A, with the intention and knowledge aforesaid, gives Z his choice whether Z will kill himself, or suffer lingering torture Z kills himself in consequence A has committed the offence of voluntary culpable homicide

The Commissioners in their First Report[3] say Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowlege that in the condition of the party to whom the words are spoken it is likely that they will make such an impression upon him as to cause his death and without any such excuse as is admissible under any of the provisions in the chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death Here is the willful doing of that which is known to be likely to produce evil manifesting the *mens rea* essential to criminal responsibility, the evil produced in death the efficient cause, the words spoken It is scarcely agreeable to reason that having traced the effect to its cause the law should refuse to acknowledge it as an effective cause, or that the Judge should be obliged to say, it is true the effect was produced by the operation of words but words in law are not an act, therefore the speaker is not criminally responsible

English law—The English law takes no cognizance of homicide unless death results from bodily injury, caused by some act or omission, as distinguished from

1 Note M pp 142 143.
2 Page 51
3 Section 249.

death occasioned by an influence on the mind, or by any disorder or disease arising from such influence.

"If a man either by working upon the fancy of another, or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in *foro humano* it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God"[1].

Death caused without intention whilst doing an unlawful act.—If death is caused under circumstances specified in s. 80, the person causing the death will be exonerated under that section. But if it is caused in doing an unlawful act, the question arises whether he should be punished for causing it. The authors of the Code remark: "It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it would be in the highest degree barbarous and absurd"[2]. But if an offender while committing a crime causes death which he did not intend to cause, or knew himself likely to cause, he should be punished for the accident. "To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence...Unhappily one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, the gentleman is shot dead. To treat the case of this pickpocket differently from that of the numerous pickpockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course...

"We trust...that we have judged correctly in proposing that when a person engaged in the commission of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death"[3]. See ill. (*c*) to this section which is contrary to English law. The Court of Criminal Appeal in England has held that if the proximate cause of an act leading to death is terror caused by another, the latter may be guilty of manslaughter, though he used no violence[4]. If two people are fighting in anger and one of them falls over and is killed, it is a case of manslaughter against the other[5]. If a person were standing at the edge of a cliff and another were to hold up his fist before him in a fighting manner, so that he fell over and was killed, it would be a case of manslaughter against that other[6]. Causing death through flight or retreat from a reasonable apprehension of serious violence is manslaughter[7].

1 1 Hale P. C. 429.
2 Note M, p. 148.
3 Note M, pp. 149, 150.
4 *James Curley*, (1909) 2 Cr. App. R. 96.
5 Per Jelf, J., in *ibid*.
6 Per Coleridge, J., in *ibid*, p. 97.
7 *Ibid*, p. 109.

English law—If a person whilst committing an unlawful act accidentally kills another he would be liable for manslaughter or murder according as his act was felony or misdemeanour[1]. But in subsequent cases this principle has been considerably modified[2]

3. **'With the intention of causing death'.**—By 'intention' is meant the expectation of the consequence in question "It is an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act"[3]. Intention does not imply or assume the existence of some previous design or forethought It means an actual intention, the existing intention of the moment, and is proved by, or inferred from, the acts of the accused and the circumstances of the case[4] Thus the deliberate use by a sane man of deadly weapons, the deliberate discharge of loaded fire-arms, leads at once to the inference that his intention was to cause death No proof of intention beyond that which such an act of itself supplies is requisite

The presumption of law is that a man intends the natural and inevitable consequences of his own acts It is, therefore, not necessary to take into consideration the accused's state of mind, at the time of committing the act in question, for the purpose of determining whether he intended to cause death, or not[5] In a Calcutta case, Mookerji, J, has observed that it is not always quite easy to apply the rule of English law that a man must be presumed to intend the natural or probable consequences of his act to the Indian criminal law in view of the distinction that the Penal Code makes between intention and knowledge On the question of knowledge much depends on the intellectual capacity of the act[6]

The existence of intention is not to be inferred unless death follows as a natural and probable consequence from the act Where, for instance, death is caused by a push or blow, which would not cause the death of a healthy person, because the person whose death is caused suffered from a disease, it would not be [illegible]

[illegible] adduced and call[illegible] that the offender [illegible] part Thus wher[illegible] stance, no presum[illegible] of fact There must be a specific [illegible] o cause death is required[8].

The 'intention' or 'knowledge' with which an act which caused death was committed is not constructive or a presumption of law, but a matter of fact to be [illegible] to explain the motives and de- [illegible] riminal in itself irrespective of its consequences, the degree of guilt of the offender depends on the intention or knowledge with which he did the act, and the sections under which he may be convicted are 302, 304, 325, 332 or 323 and 352 with variations on account of the weapon or means used, the provocation, and so forth[10]

1 *Hodgson* (1730) 1 Leach 6

2 *Edmeads* (1828) 3 C & P 390, *Collison*, (1831) 4 C & P 565, *Howell*, (1839) 9 C & P 437, 450, *Lee*, (1834) 4 F & F 63, *Warner*, (1833) 5 C. & P 525

3 Per Lord Ellenborough, C. J, in *Dixon*, (1814) 3 M & S 11 15

4 *Ghufir*, (1887) P R No 62 of 1887

5 (1856) 1 Weir 300

[illegible]

10 *Nga San Pe*, (1902) 1 L. B R. 259

4. 'With the intention of causing such bodily injury as is likely to cause death'.—The connection between the 'act' and the death caused thereby must be direct and distinct; and though not immediate it must not be too remote. If the nature of the connection between the act and the death is in itself obscure, or if it is obscured by the action of concurrent causes, or if the connection is broken by the intervention of the subsequent causes, or if the interval of time between the death and the act is too long, the above condition is not fulfilled.

"It is indispensable that the death should be clearly connected with the act of violence, not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances"[1].

The authors of the Code observe: "We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely...

"There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death; but if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide"[2].

"To justify a conviction of culpable homicide of any sort against an offender who has committed an intentional act causing bodily injury to another and which act was intended for some particular individual, there must at least be a finding that the offender intended by his act *to cause bodily injury likely to cause death*"[3].

'Intention of causing death' and 'Intention of causing such bodily injury as is likely to cause death'.—The difference between these two is a difference of degrees in criminality. The latter is a degree lower in the scale of criminality than the former. But as, in both cases, the object is the same, the law does not make any distinction in punishment[4].

Cases.—Where the accused stuffed a cloth into the deceased's mouth in order to silence him, not with any idea of killing him, it could only be presumed that the accused knew they were likely in so doing to cause his death, and so were guilty of offences under ss. 304 and 305 and not under ss. 302 and 396[5]. Where the accused caused the death of a man by an unmerciful beating mostly on the legs and arms but no bones were broken and not a single one of the injuries individually amounted to more than simple hurt, it was held that he was guilty of the offence of culpable homicide not amounting to murder[6].

5. 'With the knowledge that he is likely by such act to cause death'.—Knowledge is a strong word and imports a certainty and not merely a probability[7]. If a man intentionally commits an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held

1 Per Glover, J., in *Mahomed Hossein*, (1864) W. R. (Gap. No.) (Cr.) 31.
2 Note M, pp. 141, 142.
3 Per Fox, J., in *Shwe Ein*, (1905) 3 L. B. R. 122, 124, 12 Burma L. R. 171, 175.
4 See *Nga Min Po*, (1900) 1 U. B. R. (1897-1901) 288, 7 Burma L. R. 247; *Nga Shwe Baw*, (1900) 7 Burma L. R. 250.
5 *Sengoda Goundan*, [1915] M. W. N. 621.
6 *Jaggu*, (1925) 2 Lah. C. 112.
7 *Gahbar Pande*, (1927) 7 Pat. 638, 643.

to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness, if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender [illegible]

[illegible] m- [illegible] ot, in the ordinary course of nature, be likely to cause death may yet be imminently dangerous to another or under special circumstances Where the accused kicked his wife, eight or nine years of age, on the back with his bare foot, from which kick she fell down and died immediately it was held that he was guilty of culpable homicide not amounting to murder The Court said To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death [2] Where three persons attacked a fourth with *lathis*, the blows being directed at the head of that fourth, it was held that they must be fixed with the knowledge that they were likely to cause death[3] Presumably everybody knows that the abdomen is a most delicate and vulnerable part of the human body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal, he should be presumed to have done so with the knowledge that by so kicking he was likely to cause death[4]

Gross negligence may amount to knowledge —If a person without exercising due care and caution does any act under a sudden impulse he will be presumed to have knowledge of the consequences arising from his act Where the accused struck at with a club and killed [illegible] belief that the object at which he stru[illegible] super natural, but, through terror, hav[illegible]t was not a human being he was held to have committed the offence of culpable homicide not amounting to murder[5]

'Intention of causing such bodily injury as is likely to cause death' 'knowledge that he is likely by such act to cause death'.—The practical difference between these two phrases is expressed in the punishment provided in s 304 But the phrase 'with the knowledge that he is likely by such act to cause death' includes all cases of rash acts by which death is caused for rashness imports a knowledge of the likely result of an act which the actor does in spite of the risk

If a man causes death by doing an act merely with the knowledge that he is likely by such act to cause death, the act comes within this section, and not within s 300[6]

Cases —Knowledge of probable consequence of act —Beating —Where the accused assaulted a thief so severely that one hundred and forty one marks of separate blows were found on his body and several of his ribs were broken and he died[7], where the husband and the father of a woman, who had been enticed away, lay in wait for the offender and beat him with sticks on the back and chest and he died from the effect of the blows[8], and where a man killed his wife by a single blow[9],

1 *Ketabdi Mundul* (1879) 4 Cal 764
2 *Ibid*, p 767
3 *Harnama* (1921) 3 U P L R (L) 34, *Pel*i (1925) 7 L L J 524, 26 P L R 702
4 *H Mansel Pleydell*, (1926) 27 Cr L J 977
5 [illegible]
6 [illegible]
7 [illegible] 10
8 [illegible]
9 *Karm*, [illegible] 5 of [illegible]

or a single forcible kick on her side[1], it was held that they had committed culpable homicide not amounting to murder and that their offence fell under the latter part of s. 301.

Where the accused broke into a dwelling-house at night and, in order to evade arrest, struck wildly with a dangerous weapon, regardless of the effect of his blows, and by so doing actually caused the death of a person, he was held guilty of culpable homicide, notwithstanding that he never intended or knew himself to be likely to cause the death of such person[2]. R struck G three blows with a *lathi*. One blow fractured the bones of the left forearm, another fractured a bone in the right hand, while the third fractured both bones of the left leg. In the case of the third injury gangrene supervened and G died in consequence. It was held that R was guilty of either culpable homicide not amounting to murder under s. 301 or causing grievous hurt[3]. Where the accused inflicted four wounds none of which was on vital parts of the body, and the deceased died owing to sceptic poisoning in respect of two of them, two and a half months after the occurrence, and was sentenced to death under s. 302, it was held that the accused's intent was not to inflict bodily injury sufficient in the ordinary course of nature to cause death, but to cause bodily injury which was likely to cause death, the degree of probability as to death ensuing not being so high as to justify a finding of murder, and the conviction was altered to one under the first part of s. 301 and the sentence reduced to ten years' rigorous imprisonment[4]. Where a man was beaten to such an extent that one of his thighs was a mass of bruises, both his legs were fractured below the knee and various other minor injuries were inflicted on the legs and on the trunk, it was held that the accused must be held to have known that their act was likely to cause death[5]. Where two girls were struggling for the possession of a handful of gram and the elder girl aged fifteen gave a blow with a thin stick to the younger girl aged eight whereupon the uncle of the latter came running to the place and gave a blow with a *lathi* (club) on the head of the elder girl and after the girl had fallen gave two more blows on her thigh, and the blow on the head caused fracture of the skull and the girl died, it was held that the accused was guilty of culpable homicide not amounting to murder[6].

Exorcising evil spirit.—Where the accused, in exorcising the spirit of a girl, whom hey believed to be possessed, subjected her to a beating which resulted in her death, it was held that they were guilty of culpable homicide[7]. Although the intention of the persons who inflict beating in such circumstances is not to cause death but to exorcise the spirit they must be taken to have known that they are likely to cause death[8]. But where the injuries caused under like circumstances were not severe, the accused was acquitted[9]. Where a man deliberately murdered his wife under the belief that she was haunted by evil spirits and that if he killed her the evil spirits would leave her, he was held guilty of murder[10]. Where the accused murdered the deceased knowing full well the nature of his act, but under the belief that by so doing he was helping in the recovery of his wife and children, whose illness he attributed to the deceased, whom he believed to be a witch, it was held that the accused was guilty of murder[11]. Where the accused possessed by a superstitious belief made an offering of his child to a crocodile in a certain tank, with a

1 *Marimuthu*, (1923) 18 L. W. 188.
2 *Gujjur*, (1911) P. R. No. 12 of 1911.
3 *Rama Singh*, (1920) 42 All. 302. See *Ram Asre*, (1922) 26 O. C. 18, which dissents from this case. It holds that the words in this section "or with the knowledge that he is likely by such act to cause death" must be interpreted in the light of s. 300 and similarly are inapplicable to a case where specific bodily injury is intentionally caused to a particular person.
4 *Nga Po Chet*, (1923) 2 B. L. J. 239.
5 *Inder Singh*, (1928) 10 Lah. 477.
6 *Gahbar Pande*, (1927) 7 Pat. 638.
7 *Jamaludin*, (1892) Unrep. Cr. C. 603; *Haku*, (1928) 10 Lah. 555. In a similar case the accused were held guilty of an offence under s. 304A because the girl had consented to the beating: *Nga Po Kyaw*, (1902) 1 U. B. R. (P. C.) 1.
8 *Nga Po Tha*, (1917) 3 U. B. R. 54.
9 *Dhondi*, (1895) Unrep. Cr. C. 785.
10 *Scat Ali*, (1917) 3 P. L. W. 356.
11 *Mato Ho*, (1920) 1 P. L. T. 282.

pure heart, believing that though the crocodile would doubtless take the child away, but would return the child unharmed and the child would thereafter lead a charmed life and attain to a good old age, it was held that, as the accused had no intention of causing death to the child, he was guilty of an offence punishable under the last clause of s 304, as what he did, he did with knowledge that his act would result in the death of the child[1].

Unskilful medical treatment.—Where a man of full age submitted himself to emasculation, performed neither by a skilful hand nor in the least dangerous way, and died from the injury, the persons concerned in the act were guilty of culpable homicide not amounting to murder[2]

Any person, whether licensed or unlicensed, who deals with the life or health of another person is bound to use competent skill and sufficient attention, if the patient dies for want of either, the person is guilty of manslaughter[3]

Causing a person to be bitten by a snake.—A snake charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted, and to show his own skill and dexterity, but without any intention to cause harm to anyone, placed the snake on the head of one of the spectators The spectator in trying to push off the snake was bitten, and died in consequence It was held that the

murder[4] The

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who died It was held that the burden of proving that the accused was justified in believing and did believe that he could give immunity lay on the accused and that as he failed to discharge the burden, he was guilty of culpable homicide not amounting to murder[5]

Squeezing testicles.—Where a woman, by gripping and squeezing the testicles of her husband, reduced them to a pulpy condition, thereby causing an injury which resulted in death due to the shock so inflicted on the nervous system, it was held that she was guilty of culpable homicide[6] Here the violence of the attack on the husband's delicate parts was sufficient to justify an inference that

But where death was

unsound bodily con

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upon the deceased would not in normal conditions have endangered his life, it was held that the accused was guilty of hurt only[7]

English cases —Where a person in *loco parentis* inflicted corporal punishment on a child, and compelled it to work for an unreasonable number of hours, and beyond its strength, and the child died, the death being from consumption, he was held guilty of manslaughter[8] A schoolmaster, on the second day after a boy's return to school, wrote to the parent saying the boy was extremely obstinate, and ought to be severely and frequently beaten The father replied, "I do not

infant of two years and a half about a dozen strokes with a strap an inch wide and eighteen inches long, from the effects of which the child died, it was held that he was guilty of manslaughter[10].

1 *Bharat Bipari*, (1920) 33 C. L. J 179, 25 C. W N 670

2 *Baboolun Hijrah* (1866) 5 W R (Cr) 7

See

6 *Kalyani*, (1896) 19 Mad. 356.

7 *Bai Jiba*, (1917) 19 Bom. L. R 823, 4 Bom Cr C 144

8 *Cheeseman*, (1836) 7 C. & P 455

9 *Hopeley* (1860) 2 F

10 *Griffin*, (1869) 11 C

Death caused without intention or knowledge is not culpable homicide.—The offence of culpable homicide supposes an intention, or knowledge of likelihood, of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to a person who either is alive or who is believed by the accused to be alive[1]. In the absence of such intention or knowledge, the offence committed may be the offence of causing grievous hurt[2], or simple hurt[3].

As noticed before, even in the case of gross negligence a man is liable for the natural consequence of his act. But where death results not as a direct consequence of the act of the accused but from some other cause of which he was unaware then the accused cannot be charged with culpable homicide. Where death is caused owing to the rupture of a deceased spleen and not violence, it is on this principle that the accused is convicted of hurt or grievous hurt.

Cases.—Where the accused by a single blow with a deadly weapon killed another who was entering at dead of night into a dark room, where the accused and his wife were sleeping, for the purpose of having criminal intercourse with her, it was held that he was guilty of causing grievous hurt only[4]. Where, in the course of a trivial dispute, the accused gave the deceased a severe push on the back which caused him to fall on the road below to a distance of two cubits and a half, and in falling the deceased sustained an injury from which tetanus resulted which caused his death on the fifth day after, it was held that this was simply a case of using criminal force[5]. According to the English law this would have been treated as manslaughter. The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomitted and bled from the nose, and within little more than an hour died. The death was caused by the rupture of the spleen. It was held that he was guilty of grievous hurt only[6]. Where a man struck another on the head with a stick, and believing him to be dead set fire to the hut with a view to remove all evidence of the crime and it was found that the blow only stunned the deceased and the death was really caused by the injuries from the burning when the accused set fire to the hut, it was held that the offence committed was that of attempt to murder[7]. The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The *post mortem* examination showed that death was due to hanging. It was held that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder; and that the offence committed was one under s. 325 for having given her kicks, blows and slaps before she fell down[8]. Where the accused

1 *Palani Goundan*, (1919) 42 Mad. 547, F.B.; *Naja*, (1919) 1 L. L. J. 247.

2 *Megha Meeah*, (1865) 2 W. R. (Cr.) 39; *Chullundee Poramanick*, (1865) 3 W. R. (Cr.) 55; *Bhadoo Poramanick*, (1865) 4 W. R. (Cr.) 23; *Sheikh Solim*, (1866) 5 W. R. (Cr.) 41; *Madur Jolaha*, (1867) 8 W. R. (Cr.) 28; *O'Brien*, (1880) 2 All. 766; *Idu Beg*, (1881) 3 All. 776. See, for further cases in which the act of the accused was held to be grievous hurt, Comment on s. 320.

3 *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97; *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29; *Safatulla*, (1879) 4 Cal. 815; *Fox*, (1879) 2 All. 522; *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288. See, for further cases in which the act of the accused was held to be simple hurt, Comment on s. 319.

4 *Chullundee Poramanick*, sup.

5 *Acharjys*, (1877) 1 Mad. 224.

6 *Idu Beg*, sup.

7 *Khandu valad Bhavani*, (1890) 15 Bom. 194. The difference of opinion between the Judges in this case was a difference of fact and not of law: Per Walsh, J., in *Khubi*, (1923) 25 Cr. L. J. 703.

8 *Dalu Sardar*, (1914) 18 C. W. N. 1279.

struck his wife a bl ... to be a blow likely ... her to be dead, in ... hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation, it was held that the accused was not guilty of either murder or culpable homicide not amounting to murder but was guilty of grievous hurt[1].

L, who had a stick in his hand, attacked B who had none Learning that G was coming to help B, L entered his house whence he fetched a chopper and renewed his ... injury L allowed himself to be disarmed ... the scuffle that ensued B was sent to the ... umonia It was held that there being no intention to cause death L could only be convicted of having caused ...

... ny ancillary violence, sexual in- ... er twelve years of age, the girl ... a result, she died of shock It ... equence to be expected from a simple sexual offence, the accused was not guilty of culpable homicide[3]

Death due to diseased spleen —(1) *Grievous hurt* —Where the accused gave a blow with a light bamboo stick, not more than an inch in diameter, to the deceased, ... l spleen, on the region of that organ, he was held ... The accused went to a place where a cart was ... belonged to a man who was sleeping on a cot close ... him have the cart The man explained that ... and remarked at the same time that he was ill The accused, thereupon, got irritated and pulled the cot about, causing the man to fall out of it, kicked him and struck him on the side or on the ribs with a stick Owing to the injuries he had received, the man died very soon after It was held that as the deceased was suffering from a diseased spleen the accused was guilty ...

... ceived great provocation from his ... her with violence to the ground, and after she was down slapped her with his open hand, and the woman died on account of rupture of her spleen which was diseased, it was held that the accused was guilty of causing hurt[5] Similarly, where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by her, the husband not knowing that the spleen was diseased, he was held guilty of causing hurt[7] The accused, dissatisfied and irritated by the lazy and inefficient manner in which a punkha cooly was managing a punkha, went up to him and struck him one or more blows The cooly was suffering from a diseased spleen and died from the injuries he had received It was held that the accused was guilty of causing hurt[8] Where the accused threw a piece of a brick at the deceased which struck him in the region of the spleen and ruptured it, the spleen being diseased, it was held that he was guilty of causing hurt[9] The accused was charged with having caused the death of one N by kicking him over the regions of the spleen, being enraged at the latter having allowed his goats to stray into his field The medical evidence showed that the spleen of the deceased was enormously large, and slight injuries

1 ... '47, P R
... I U P
... 4 ... L J
... W R
3 Shamsu ... (1...) ... All 410
4 *Megha Meeah* (1865) 2 W R (Cr) 39
5 *O'Brien*, (1880) 2 All 766.
6 *Punchanun Tantee*, (1866) 5 W R (Cr) 97
7 *Bysagoo Noshyo*, (1867) 8 W R (Cr) 29
8 *Fox*, (1879) 2 All 5..
9 *Pandhir Singh*, (1 ...) 1 Weir 288

over the region of the spleen would be sufficient to cause its rupture which generally ends fatally. It was held that in the absence of satisfactory evidence to prove knowledge of the state of health of the deceased on the part of the accused, the conviction should be for hurt only[1].

6. **Explanation 1.**—A person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerating the death of that other, is deemed to have 'caused his death'. But one of the elements of the offence of culpable homicide must be present[2]. The explanation assumes that the bodily injury was inflicted with the intention of causing death, or the knowledge that it would be likely to cause death. Where there is no such intention or knowledge the offence is not culpable homicide under the first two parts of this section[3].

"An offence affecting the life of a person who must soon die either from a mortal disease or in course of nature from old age and decay, is not a less offence than one which affects the life of a person in strong health. The offender causes death in the one case by accelerating that event by a few months, or days, or hours; in the other case, possibly, he hastens the event by many years. The real difference between the two cases is not in point of law, but in respect of the degree of proof, requisite to show the cause of death. For where the death of a person who receives some bodily injury while labouring under a disease is the subject of enquiry, the Court in estimating the evidence must consider whether it is sufficiently proved which of the two causes, the disease or the bodily injury to the deceased person, is the cause of his dying on the day when his death occurs. It is not necessary (if it were possible) that the evidence should enable the Court to apportion the two causes and the degree in which each of them contributes to the result. But the Court must be satisfied (1) that the death at the time when it occurs is not caused solely by the disease; and (2) that it is caused by the bodily injury to this extent, that it is accelerated by such injury. Suppose A is ill of small-pox, and Z gives him pills in such doses that the disease is aggravated and death is accelerated; Z has *caused death*, notwithstanding that it may be proved that A must have eventually died of the small-pox"[4].

The English law is to the same effect[5]. The accused one night came home before his wife, and he was in a condition of violent excitement, and was overheard to express a determination of "giving his wife something" when she came in. When the woman did come home there were at once sounds of an altercation, and shortly afterwards the woman was seen by several witnesses to rush from the house into the road closely pursued by the accused, who was at the same time using violent threats towards her. She was then seen to fall into the roadway, and lying there she was kicked on the left forearm by the accused. When picked up she was found to be dead. The *post mortem* examination showed that the deceased was suffering from a persistent thymus gland, and the medical evidence was to the effect that any combination of physical exertion and fright or strong emotion might occasion the death of the person having such gland. It was held that the evidence that the death of the deceased was due to a combination of physical exertion and fright, or strong emotion caused by an illegal act of the accused, was sufficient to support a conviction for manslaughter without proof of actual violence on his part occasioning the death[6].

The Calcutta High Court has held that if a person was suffering from an injury which would render injuries (which would not have a fatal effect to an ordinary man) fatal to that person, it does not necessarily follow, as it would in

1 *Aiman*, (1904) 1 A. L. J. (Notes) 162.
2 *Fox*, (1879) 2 All. 522.
3 *Ismail*, (1917) 11 S. L. R. 79.
4 M. & M. 257.
5 *Murton*, (1862) 3 F. &. F. 492; *Martin* (1832) 5 C. & P. 128.
6 *Hayward*, (1908) 21 Cox 692.

the case of a healthy man, that the person inflicting those injuries knew it to be likely that death would be caused thereby[1]

7 **Explanation 2 —'By resorting to proper remedies death might have been prevented'** — The explanation reproduces the English law The authors of the Code say "We see no reason for excepting such cases [the cases of persons who die of a slight wound, which from neglect or from the application of improper remedies, has proved mortal] from the simple general rule which we propose It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart, and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death yet both these points might be fully established Suppose such a case as the following—It is proved that A inflicted a slight wound on Z a child who stood between him and a large property, it is proved that the ignorant and superstitious servants about Z applied the most absurd remedies to the wound it is proved that under their treatment the wound mortified and the child died Letters from A to a confident are produced, in those letters, A congratulates himself on his skill remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound It appears to us, that if such evidence was produced, A ought to be punished as a murderer

'Again suppose that A makes a deliberate attempt to commit assassination in the presence of numbers he aims a knife at the heart of Z, but the knife glances aside and inflicts only a slight wound In such cases there is no doubt whatever as to the intention Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that in consequence, he is attacked with tetanus and dies Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer [2]

'Although proof be given that the wound or other bodily injury if skilfully treated might not have resulted in death, yet if in fact death is the result, the wound 'causes' death And it does not avail the offender to prove that the first might have been removed or rendered inoperative by the application of proper remedies and that death might thus have been prevented Proper remedies and skilful treatment may not be within the reach of the wounded man or, if they are at hand he may be unable or unwilling to resort to them But this is immaterial so far as relates to the due interpretation of the words cause of death The *primary cause which sets in motion some other cause* —as the *severe* wound which induces gangrene or fever,—and the ultimate effect, death are sufficiently con

there will be some perplexity in determining the *cause of death* Suppose a person who has received some slight wound or hurt resorts not to 'proper remedies and

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suppose he is carried to a hospital where erysipelas happens at the time to be prevalent, and catches the disorder and dies of it—or again suppose the bo[illegible]

[1] *Anudh Chowdhir* (1921) 34 C L J [2] N to M p 143

injury renders the amputation of a limb necessary, and that the patient is soon afterwards attacked by some complaint innocuous to a person in sound health, but which proves fatal to him in his weakly condition. In all these cases, if no bodily injury had been received, the man would not have died; and it may therefore be said that the injury is in some sense the cause of death. But it seems indispensable that the death should be connected with the act of violence or other primary cause not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.

"In each of the instances we have last supposed, the bodily injury caused death under extraordinary circumstances. Its direct influence in producing that result was small, and the intervening circumstances which more immediately caused death could scarcely have been foreseen. Nevertheless the use of the words 'to cause death' without qualification or exception, brings such cases within this term of the definition of the offence of culpable homicide. The difference between these cases and others of less complexity is a matter to be considered by the Court in estimating the effect of the evidence. But it is difficult to conceive any evidence sufficient to establish an intention to cause death on the part of a person who inflicts a bodily injury which ends so unexpectedly in death"[1].

Cases.—Where a wound is inflicted under circumstances that immediate death would make the person inflicting it guilty of murder, he will be liable for murder even if the death ensues from an *operation thought necessary* and performed by competent medical advisers, who considered that the wound was dangerous[2]; nor will the liability be less even though life may have been preserved but for the refusal of the deceased to submit to a surgical operation[3]. Where the accused was indicted for the murder of his wife by kicking her, and a surgeon administered brandy to her as a restorative, some of which went the wrong way, and entered her lungs, and might have caused death, it was held that he was guilty of manslaughter[4]. Similarly, where an injury was inflicted on a person by a blow which in the judgment of competent medical men rendered an operation advisable, and, as a preliminary to the operation, chloroform was administered to the patient, who died during its administration, and it was agreed that the patient would not have died but for its administration, it was held that the person causing the injury was liable to be indicted for manslaughter[5]. If the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter according to circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of gangrene or fever, is the immediate cause of the death, *causa causati*. Thus, it was resolved, that if one gives wounds to another who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter according to the circumstances; because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who receives the wounds shall not excuse the person who gave them[6].

1 M. & M. 228.

2 *Edward Lawes Pym*, (1846) 1 Cox 339.

3 *Joseph Holland*, (1841) 2 Mood. & R. 351.

4 *McIntyre*, (1847) 2 Cox 379.

5 *Davis*, (1883) 15 Cox 174. See, to the same effect, *Kalu Kaan*, (1911) 5 Cr. L. Rep. 35.

6 1 Hale P. C. 428; *Ryan*, (1868) 16 W. R. (Eng.) 319. See, to the same effect, *Mammi*, (1927) 29 Cr. L. J. 345.

8 **Explanation 3** —This explanation gets over the difficulty of proving the birth of a child as required by English law Under the English law the child should have completely emerged to constitute it a human being

The causing of the death of a child in the mother s womb is not homicide such an offence is punishable under s 315 The life of a child while it remains wholly within the womb is a part of the mother s life and not a separate and distinct existence But as soon as any part of the child has been brought forth from the womb the child is accounted a living human being to cause whose death may be culpable homicide It is further explained that this may be so though the child may not have breathed The mere fact of having breathed is a very uncertain indication of life in such cases for it is well known that many children are wholly brought forth and eventually live and yet do not breathe for some time after their birth

It may be said that a child is not completely born until after the umbilical cord has been severed notwithstanding that the mother has been completely delivered and that the child is in existence But it is obvious that to cause the death of such a child ought to be deemed an offence of the same nature as the causing of the death of a child one month one year or ten years old The explanation expressly states that complete birth is not requisite Instead of an uncertain period which it would be difficulty to define satisfactorily and which would in many cases of infanticide greatly add to the difficulty to prove a definite and readily ascertained point of time (that is the time when any part of the child is brought forth) is fixed to denote when the child may become a subject of culpable homicide [1] Under this explanation it must be proved not only that the child breathed and was therefore a living child (for that might have done while it was still entirely in the womb) but that it breathed after it had wholly or partially emerged from its mother s womb[2]

The use of the word child seems to assume that the fœtus must have assumed the human shape

300 Except in the cases hereinafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death[1] or—

Murder

2ndly —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death[2] of the person to whom the harm is caused, or—

3rdly —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death[3], or—

4thly[4] —If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid

ILLUSTRATIONS

(*a*) A shoots Z with the intention of killing him Z dies in consequence A commits murder

1 M. & M 231

2 *Mussammat Budho* (1915) P P No 22 of 1915

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

When culpable homicide is not murder.

Exception. 1[5].—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First[6].—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly[7].—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly[8].—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation[9].—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATIONS.

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from dong so. A is moved to sudden and

violent passion in consequence, and kills Z This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence

(f) Z strikes B B is by this provocation excited to violent rage A, a bystander, intending to take advantage of B s rage, and to cause him to kill Z, puts a knife into G's hand for that purpose B kills Z with the knife Here B may have committed only culpable homicide, but A is guilty of murder

Exception 2[10] —Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION

Z attempts to horsewhip A not in such a manner as to cause grievous hurt to A A draws out a pistol Z persists in the assault A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead A has not committed murder, but only culpable homicide

Exception 3[11] —Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4[12] —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation —It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5[13] —Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent

ILLUSTRATION.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide Here, on account of Z s youth he was incapable of giving consent to his own death, A has therefore abetted murder

COMMENT

In this section the definition of culpable homicide appears in an expanded form In the Penal Code 'culpable homicide' is used as a generic term, and is exhaustively sub-divided into . . amounting to murder (s 300, cls 1, 2 3, .
(s 299 and exceptions to s

finitions of 'culpable homicide' and 'murder' are the weakest part of the Code as they are defined in terms closely resembling each other.

Culpable homicide is murder where the party inflicting the injury does it either with the intention that it should cause death or with the knowledge that it may do so. It will not be murder if the case falls within any of the exceptions. Where there is neither intention, knowledge, nor likelihood that the injury will or can result in death, the offence would be neither murder, nor culpable homicide not amounting to murder, but would be voluntarily causing grievous hurt or hurt and the conviction in such a case would be either under s. 325 or s. 326 according to the nature of the weapon used[1] or under s. 323.

The Code nowhere makes premeditation a necessary concomitant to murder. Whatever the motive may be, or whether or not any motive whatsoever be discoverable, the sole point for enquiry is, whether the person inflicting the injury did so with the intention or knowledge as specified in the section[2].

Scope.—An offence cannot amount to murder, unless it falls within the definition of culpable homicide; for this section merely points out the cases in which culpable homicide amounts to murder. But an offence may amount to culpable homicide and yet may not amount to murder.

In deciding the question whether culpable homicide amounts to murder, it will be erroneous to convict the accused of murder, simply because there is nothing to bring him under any of the exceptions reducing the offence to one not amounting to murder, and it is the duty of the Court to consider, in the first place, whether the element or elements which constitute the offence of murder, as defined in this section, exist[3]. In *Sheikh Bazu*[4], Peacock, C.J., observed: "It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder, the case must come within the provisions of clauses 1, 2, 3 or 4 of s. 300".

English law.—Murder is unlawfully causing the death of another with malice aforethought, express or implied. Malice aforethought, in murder, practically means—

(1) An intent to kill or do grievous bodily harm to the person who is killed.

(2) An intent to kill or do grievous bodily harm to anyone else.

(3) An intent to do any criminal act which will probably cause death or grievous bodily harm to some one.

(4) An intent to oppose by force any officer of justice who is lawfully arresting or keeping in custody some one whom he is entitled to arrest or keep in custody, provided the accused knows that he is such officer of justice.

The law of British India, differing from the law of England, does not regard every case of homicide as *prima facie* murder: it throws on the prosecution the burden of proving a certain intent or knowledge[5]. The English law looks to the act and throws on the accused the burden of proving, from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to murder[7]. The Indian Penal Code looks to the intention and knowledge of the accused and not to the effect caused by the act.

Culpable homicide and murder distinguished.—The distinction between these two offences is very ably set forth by Melvill, J., in *R.* v. *Govinda*[6], in which the accused knocked his wife down, put one knee on her chest, and struck her

1 See *Ghulam Muhay-Ud-Din*, (1921) 22 Cr. L. J. 658.
2 *Mahomed Elim Abdool Kurreem*, (1865) 3 W. R. (Cr.) 40.
3 *Pasput Gope* v. *Ram Bhajan Ojha*, (1897) 1 C. W. N. 545; *Attra*, (1891) P. R. No. 9 of 1891; *Sheikh Pyao*, (1883) P. R. No. 27 of 1883.
4 (1867) 8 W. R. (Cr.) 47, 51, F.B.
5 (1881) 1 Weir 288.
6 *Greenacre*, (1837) 8 C. & P. 35.
7 (1876) 1 Bom. 342, 344-46. See *Inder Singh*, (1928) 10 Lah. 477, where also the distinctions are discussed.

two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain and she died in consequence The Court held that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed was not murder but culpable homicide The learned Judge said

"For convenience of comparison, the provisions of Sections 299 and 300... may be stated thus —

SECTION 299	SECTION 300
A person commits culpable homicide, if the act by which the death is caused is done	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done
(a) With the intention of causing death	(1) With the intention of causing death,
(b) With the intention of causing such bodily injury as is *likely* to cause death	(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused* (3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death
(c) With the knowledge that the act is *likely* to cause death	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death

'I have underlined the words which appear to me to mark the differences between the two offences

'(a) and (1) show that where there is an intention to kill, the offence is always murder

"(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury Furious driving, firing at a mark near a public road, would be cases of this description Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder

"The essence of (2) appears to me to be found in the words which I have underlined The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause [illegible]

in a sound state of health'

[illegible]

to cause death, it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death The distinction [illegible] same distinction as that between (c) and [illegible] degree of probability Practically, I thi[illegible] consideration of the nature of the weapon [illegible] a vital part may be likely to cause death, a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death"

As regards (c) Peacock, C J, observes in *Gora Chand Gopee's* case[1] "There are many cases falling within the words of s 299 'or with the knowledge that he

[1] (1831) 5 W R (Cr) 45, 16, F B

is likely by such act to cause death' that do not fall within the 2nd, 3rd, or 4th Clauses of s. 300, such for instance as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in Clause 2 or 3 of s. 300.

"As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill anyone. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as to bring the case within the 4th Clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding...If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as in Clause 4, s. 300.

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

"Suppose a gentleman should cause death by furiously driving up to a Railway Station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death. Would anyone under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the Judge or Jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known and did know that his act must in all probability cause death, &c., within the meaning of clause 4, s. 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment".

Plowden, J., in *Barkatulla's* case said: "It may be useful here to point out that the Indian Penal Code contemplates that when an act is culpable homicide, whether amounting to murder, or not amounting to murder, by reason of the act being done with the knowledge described in clause (3) of s. 299 (or with the knowledge described in clause 4 of s. 300, which knowledge satisfies the definition in clause 3 of s. 299), an intention to cause death or to cause such bodily injury as is likely to cause death must be absent. When intention of either kind co-exists with the knowledge described, the knowledge merges in the intention, and a higher

degree of guilt is imputable That the degree of guilt is higher when a murderous intention exists (which intention seems to be deemed to import the specified knowledge), and is lower when the knowledge is unaccompanied by such inten

punishment"[1]
to kill, or to
at death must

be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder [2]

Where, therefore the act of the accused does not fall within the first clause of s 300, that is, where the act was done not *with the intention of causing death*, the difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue It is culpable homicide where death must have been known to be *a probable* result It is murder, where it must have been known to be *the most probable* result

Culpable homicide may, therefore, not be murder (1) where notwithstanding the mental state is sufficient to constitute murder, one of the exceptions to s 300 applies or (2) where the mental state, though within the description of s 299, is not of the special degree of criminality required by s 300

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder, the accused should be convicted of the lesser offence[3].

1 Clause 1.—'Act by which the death is caused is done with the intention of causing death'.—The word 'act includes omissions as well (s 33) See Comment on s 299 Any omission by which death is caused will be punishable as if the death is caused directly by an act Thus, if a person neglects to provide his child with proper sustenance although repeatedly warned of the consequences, and the child dies, it will be murder[4]

'Death' means the death of a human being (s 46) It will be murder whether death is caused of a grown up person or a newly born child[5]

As to intention', see Comment on s 299, *supra* Where a man stabs another in a vital part he must be held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions, which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder[6] Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder[7] But where there is nothing more than a fatal result to indicate an intention to cause death and no weapon is used, it is unsafe to convict of murder[8]

Cases —Neglect to provide medical aid or food —Infant —Where M was

years, who died of confluent
wing to certain religious views
to the child during its illness

neglect of reasonable means for preserving or prolonging the child s life, but to convict of manslaughter it must be shown that the neglect had the effect of shortening

1 (1887) P R No 32 of 1897, p 65 See

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2 *Nga Po Lung* (1883) S J L B 457

4 *Gunga Singh* (1873) 5 N W P 44, *Ram Prasad* (1883) 3 A W N 231

5 *Irowa Basapa* (1888) Unrep Cr C 401

6 *Nga Dwe* (1904) 10 Burma L R 171

7 *Mahomed Elim Abdool Kurreem* (1865) 3 W R (Cr) 40

8 *Daude Gangadu*, (1881) 1

life...In order to sustain the conviction affirmative proof is required"[1]. In an earlier case it was distinctly shown, and found by the jury, that the child's death was caused by the neglect to provide medical aid, and therefore the conviction for manslaughter was upheld[2]. Where the death of a child was caused by neglect to supply him with proper nourishment, it was said that mere negligence would not do, there must be wicked negligence[3]. These cases are decided under the Prevention of Cruelty to Children Act, which is in force in England. To warrant the conviction of a woman for manslaughter of her new-born child, whose death is caused by want of proper care at birth, it is not enough to show that such woman was guilty of criminal negligence by purposely arranging to be unattended at her confinement. She must also be proved to have been further guilty of negligence towards the child after it was completely born[4].

Neglect to provide medical aid or food.—Adults.—A girl of eighteen was taken in labour in the house of her step-father. The mother did not procure the aid of a midwife, in consequence of which the daughter died. The evidence did not show that she had means to pay the midwife. It was held that she was not legally bound to procure the aid of a midwife and that she could not be convicted of manslaughter[5]. Where a mistress omitted to supply her servant with proper food and lodging and so caused her death, it was remarked: "The law clearly is that, if a person has the custody and charge of another and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody; but it is also equally clear that, when a person, having the free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue"[6]. The accused, a woman of full age and without any means of her own, lived with, and was maintained by, the deceased, her old aunt. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the accused lived in the house and took in the food supplied by the tradesman, but, apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance or inform anyone of the condition of the deceased. The death of the deceased was substantially accelerated by want of food, nursing, and medical attendance. It was held that a duty was imposed upon the accused under the circumstances to supply the deceased with sufficient food to maintain life, and that the death of the deceased having been accelerated by the neglect of such duty, the accused was guilty of manslaughter[7].

Mere presence not sufficient for conviction of murder: common intention is necessary.—Mere presence as a member of a gang which has committed murder is insufficient to support a conviction for murder. It must be shown that murder was the common object of the gang and that the accused did some act in furtherance of the common object[8]. Where the accused are present at the time of a murder and thereby give moral support to it, they are as much guilty of murder as the murderer himself[9]. Where the accused, a menial servant, accompanied his master with the intention of rendering such assistance as might be required when the latter had announced his intention of committing murder, it was held that the accused was guilty of murder[10]. Where a blow was struck by A in the presence of, and by the order of, B, both were held to be principals in the transaction; and

1 *Morby*, (1881) 8 Q. B. D. 571, 574.
2 *Downes*, (1875) 1 Q. B. D. 25.
3 *Nicholls*, (1874) 13 Cox 75.
4 *Izod*, (1904) 20 Cox 690.
5 *Shepherd*, (1862) 31 L. J. (M. C.) 102.
6 Per Erle, C. J., in *Smith*, (1865) L. & C. 607, 624.
7 *Instam*, [1893] 1 Q. B. 450.
8 *Wansarapu Baladu*, (1881) 1 Weir 296; *Kammari Kannappa*, (1881) 1 Weir 297.
9 *Tulli*, (1924) 22 A. L. J. 1075.
10 *Golla Sanyasi*, (1881) 1 Weir 296.

where two persons joined in beating a man and he died, it was held not necessary to ascertain exactly what the effect of each blow was[1]

2 **Clause 2 —'With the intention of causing such bodily injury as the offender knows to be likely to cause the death'.**—See Comment on s 299 In order to convict a person of the offence of murder under this clause it has to be found that he had the intention of causing the injury and also that he had the knowledge that such injury which he intended to inflict was likely to cause death The word knowledge imports a certainty and not merely a probability[2] If a man strikes another on the head with a stick when he is asleep and fractures his skull knowledge of likelihood of causing death must be presumed, and the offence committed is murder[3] As to the intention to be presumed in cases of blows on the head
tells every man that t
possibly result or is

blow is struck with a stick that is not heavy the offence would be culpable homicide not amounting to murder[4]

This clause also applies in special cases where the person injured is in such a condition or state of health that his death would be likely to be caused by an injury which would not ordinarily cause the death of a person in sound health and where the person inflicting the injury knows that owing to such condition or state of health it is likely to cause the death of the person injured[5]

Cases —Where A several times kicked B who after having been severely beaten fell down senseless it was held that A was guilty of murder as he must have known that such kicks were likely to cause death in B s state at that time[6] Where four men beat another so severely that death ensued from the injuries received it was held that they must be presumed to have known that by such acts they were likely to cause death and that the offence of murder was not reduced to culpable homicide not amounting to murder by the absence of intention to cause death[7] Where a man struck another on the head with a stick when he was asleep and fractured his skull it was held that knowledge of likelihood of causing death must be presumed and that he was guilty of murder[8] A cut Z on the head

the frontal bone and cutting the brain Z
medical evidence showed that the wound
death It was held that A s intention must be inferred not merely from the actual consequences of his act but from the act itself and as the natural consequence of an act of the kind in question would be death A must be presumed to have intended to cause death[9] Where a person struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death he was held guilty of murder[10] It was held likewise where a blow was given with a bottle full of liquid[11] A body of six persons attacked another with cattle goads in a violent and determined manner inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen

1 *Mohan el* [illegible] (18 4) 23 W P (Cr) [illegible]
2
3[illegible]
4
7 *Pooshoo* (1865) 4 W P (Cr) 33 *Garib* (1919) 17 A L J 985 *Parshadi* (1928) 30 Cr L J 509
8
9
10
11
Cr) Burma L R 29

and so caused his death. The person attacked was a strongly built man of thirty-five years of age, and his spleen was in a healthy state. It was held that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death; and that the offence amounted to murder[1].

The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both lungs and of the spleen. It was held that the crime fell under the first or second clause of s. 300 as the intention was clear whether to kill or to cause a dangerous injury and thus the case was taken out of the purview of clause 4 which applied to cases in which there was no wish to kill or to hurt[2]. Where in continuation of an altercation which had taken place earlier in the day between the mother of the accused and the wife of the deceased the two men were struggling in front of their houses when the accused suddenly struck the deceased with a weapon which was variously described as a spear head or a sickle and the medical evidence showed that the person of the deceased bore two wounds of penetrating nature one of which completely perforated the heart; the other penetrating the abdomen on the left side had divided the intestines, it was held that having regard to the nature of the wounds inflicted it must be deemed that his intention was, if not to cause death, at least to cause such bodily injury as was likely to cause death[3].

In the course of a murderous attack on his wife by the accused, the former ran to the deceased woman for protection and clasped her arms round her waist. The accused thereupon gave a fatal stab to the deceased with the sole object of making her let go his wife, so that he might wreak his vengeance on her. The accused had no quarrel with the deceased and had no intention of killing her. It was held that the accused was only guilty of culpable homicide not amounting to murder, as he did not intend to inflict such injury on the deceased as was likely to cause her death or was sufficient in the ordinary course of nature to cause her death[4]. A attacked his mother-in-law, Y, a woman of fifty-five, with an edged instrument but by mistake cut another woman, Z, on the arm. Z, who was sixty-one years of age, died from the effects of the wound, although the Civil Surgeon considered that the injury was not sufficient in the ordinary course of nature to cause death to a woman of her age. The Sessions Judge considered that this clause was applicable on account of Y's age. It was held that this clause was not applicable because (1) as the injury was actually caused to Z, although intended for Y, Y's age did not affect the question at all, and (2) in view of the medical evidence and of the fact that the injury was not on a vital part of the body, A could not be held to have intended such bodily injury as he knew to be likely to cause the death of either Y or Z, or such bodily injury as was likely to cause death[5].

Dhatura poisoning.—Where a woman of twenty years of age was found to have administered *dhatura* (a poisonous herb) to three members of her family, who ultimately recovered, it was held that she was guilty of attempt to commit murder as she must be presumed to have known that the administration of *dhatura* was likely to cause death, although she might not have administered it with that intention[6]. It is not clear from the judgment in this case how the Court came

[1] *Elem Molla*, (1907) 37 Cal. 315. See *Naba*, (1910) P. W. R. (Cr.) No. 12 of 1911, to the same effect.

[2] *Nawab*, (1914) P. R. No. 31 of 1914.

[3] *Lachhman Singh*, (1925) 7 L. L. J. 58?

[4] *Perumal Naiken*, [1912] M. W. N. 193, per Abdur Rahim and Sundara Aiyar, JJ., Spencer, J., dissenting).

[5] *Ban U*, (1908) 4 L. B. R. 367.

[6] *Tulsha*, (1897) 20 All. 143.

to that finding, as it was held that although the accused knew that she might cause death she had no intention to do so, but intended only to incapacitate temporarily the persons to whom she administered the *dhatura* in order that she might run away with her lover The same High Court in a subsequent case said '*Dathura* is not exactly a deadly poison and may often be given for the purpose of merely stupefying a victim" On this ground it held, where, for the purpose of facilitating robbery, *dhatura* was administered by two persons to certain travellers in consequence of which one of the travellers died and others were made seriously ill, that, in respect of the traveller who died, the offence committed was that of grievous hurt (s 325), and, in respect of the travellers who did not die, the offence committed [illegible]

[illegible] us hurt[2] Where *dhatura* was administered with [illegible] but in such quantity that the person to whom [illegible] of a few hours, it was held that the person so administering *dhatura* was guilty of murder[3] The former Chief Court of the Punjab followed this decision in a case in which the accused administered *dhatura* to A and B, both of whom died from the effects thereof and on the following date he administered the same poison to C and D, the former got ill and recovered, but the latter died It held that the accused was guilty of murder, for, when he administered *dhatura* poison he committed an act which, even if not committed with the intention of causing death or causing bodily injury likely, to the knowledge of the offender, or in the ordinary course of nature sufficient, to cause death was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and that the accused was guilty of an offence under s 307 as regards the poison administered to C The Court observed "It would be putting a premium on murder to hold that the giving of *dhatura* in this reckless fashion is comparatively a minor offence We cannot agree with the *dicta* in the judgment of the Allahabad High Court in the case of *Emperor v Bhagwan Din*[4] and we prefer, in the interests of public safety, to follow the ruling of [illegible] r v *Gutali*[5] As remarked by the learned [illegible] th does not always follow from *dhatura* [illegible] lerable proportion of cases[6] In this case it was found by the Court that the accused was an expert in *dhatura* poisoning and knew well that the poison worked in a most effective and dangerous manner upon his victims But where the accused caused the death of two persons by administering to them *dhatura* in order to facilitate the commission of robbery, the same Court, in another case, held that they were guilty of an offence under s 328 and not under s 302 It said that "no hard and fast rule can be laid down as to the section of the Indian Penal Code applicable, and that the circumstances of the particular case must be taken into consideration' It further observed that it had not been shown that the accused administered *dhatura* with such intention or knowledge as would make them guilty of murder[7] In case of murder by *dhatura* poisoning it is to be determined with what object it is administered Its use may be merely in order to facilitate the commission of robbery and it does not *per se* and necessarily import contemplation of the victim's death as a means towards or as incidental to the main end of that offence The point is to be decided with regard to the circumstances of each case and the best indication of the intention of the offender can be gathered from the amount of *dhatura* which he administers Where a large quantity of *dhatura* is administered the offender shall

1 *Bhagwan Din* (1908) 30 All 568
2 *Nanhu*, (1923) 45 All 557
3 *Gutali* (1908) 31 All 148
4 (1908) 30 All 568 571
5 (1908) 31 All 148
6 *Lala* (1910) P L R No 32 of 1911 p 171
7 *Sadhu* (1918) P R No 19 of 1919

be presumed to intend to cause the death of the victim for the successful termination of his crime[1].

The Bombay High Court has followed the rulings in *Q.-E.* v. *Tulsha, Emp.* v. *Gutali, Emp.* v. *Gauri Shankar* and *Emp.* v. *Nanhu* and has dissented from *Emp.* v. *Bhagwan Din.* The accused administered *dhatura* to five men for the purpose of facilitating the commission of robbery. Three of them died and the remaining two were taken seriously ill and regained consciousness after four days. The Sessions Judge convicted them under s. 325, for causing the death of three men; and under s. 328 for administering the poisonous substance to the other two. He acquitted them of the charge under s. 302 for causing the death of the three men as he held that there were no sufficient grounds for holding that the accused knew that they were likely to cause death by the administration of *dhatura.* It was held, setting aside the acquittal, that the accused were guilty of murder under cl. (4) of s. 300, as they had sufficient knowledge of the fact that administering *dhatura* often resulted in death and was likely to cause death[2]. The Court observed: "Having regard to the extent to which *dhatura* poisoning does take place in India, both in the case of men and cattle, there is very adequate ground for attributing, at any rate, to ordinary Indian villagers a knowledge of the dangerous results that may occur from administering *dhatura*"[3]. "In the case of adult persons...deliberately administering *dhatura* or some such poison or deleterious substance, and in quantities such as to kill three persons within a few hours on the spot, the burden is heavily on the accused to show why the ordinary presumption from an act so imminently dangerous and so probably fatal should not be drawn...Persons making use of poisons which, besides being intoxicants, may likewise prove fatal if administered in sufficient quantity, cannot escape the fatal consequences of this reckless administration, without showing that they were not possessed of the ordinary knowledge of adults, which even villagers are presumed to possess"[4].

Arsenic.—A person who administers a well-known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and, if death ensues, he is guilty of murder, notwithstanding that his intention may have been to cause death. Where the accused administered arsenic to a boy nine years of age with the object of preventing the father of the boy from appearing as a witness against himself in a criminal case, but in such quantity that, the boy died in the course of three days, it was held that he was guilty of murder, though his intention might not have been to cause death[5]. The accused sent sweetmeats poisoned with arsenic to A, with the intention of causing her death and that A, as well as D and C to whom she gave a part of the sweetmeat, all became seriously ill as a consequence of partaking of it but they all recovered from the effect of the poison. It was held that the accused was guilty of attempting to murder B and C as well[6].

3. Clause 3.—'With the intention of causing bodily injury to any person...sufficient in the ordinary course of nature to cause death'.—The distinction between this clause and clause (2) depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury *sufficient* in the ordinary course of nature to cause death; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury *likely* to cause death[7].

1 *Kesar Din,* (1919) 21 P. L. R. 6.
2 *Shetya,* (1926) 28 Bom. L. R. 1003, 8 Bom. Cr. C. 322.
3 Per Fawcett, J., in ibid, p. 1008.
4 Per Madgavkar, J., in *ibid.,* pp. 1011, 1012.
5 *Gauri Shankar,* (1918) 40 All. 360.
6 *Ladha Singh,* (1920) 3 L. L. J. 191.
7 *Po Sin* alias *Po Sin Gyi,* (1909) 5 L. B. R. 80; *Apalu,* (1923) 1 Ran. 285.

In the case of some classes of injuries, it is easy to say what was intended, for instance, in a wound with a knife in the abdomen A man who inflicts such a wound intends to inflict a wound which we must know will be dangerous to life But in the case of wounds with blunt instruments, the intention is not so clear The effect of a severe blow upon one man will be very different from what it will be upon another, and it does not follow, when the victim dies, that it was intended to inflict such injury as is sufficient to cause death A Judge must always find whether the bodily injury inflicted was that which was intended by the prisoner[1].

The words of s 299 "or with the intention of causing such bodily injury as is likely to cause death" amount to murder only when it can be held that the likelihood of death is so great that the bodily injury intended to be inflicted must be held to be an injury sufficient in the ordinary course of nature to cause death so as to bring the case within the third clause of s 300 Where the likelihood is not sufficiently high, the offence is that of culpable homicide not amounting to murder[2] In cases of death caused by reckless violence the nature of the weapon used is a test for deciding whether the crime falls under s 299 or this clause[3] The accused savagely attacked and wounded their cousin with a hatchet, who was laid up with fever in consequence of the wounds for about forty days and ultimately died of blood poisoning It was held that the accused were guilty of murder, the wounds inflicted by them being the cause of death[4] Where a person received grievous injuries and was detained in hospital and as a result of these injuries pneumonia supervened and the victim died, it was held that those who caused the injuries were guilty of murder[5]

It cannot always be assumed that, when a man strikes a blow on the head, he intends to cause death or injury sufficient to cause death or even injury likely to cause death[6] Owing to a quarrel which the deceased had with the accused, the latter armed himself with an iron shod stick and struck one blow with it on the head of the deceased which caused his death He was convicted of murder It was held that, inasmuch as it was possible that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it, the conviction should be altered from murder to culpable homicide not amounting to murder[7] Where a person who struck a blow on the head with a deadly weapon and with such violence as to cut through the skull, it was held that he did so with the intention of causing death or such bodily injury as is likely to cause death and was guilty of murder[8]

Cases.—Stabbing in a vital part.—The accused stabbed the deceased with a [illegible] hough not severe, was in such a part of the body [illegible] but the dagger did not penetrate to any great [illegible] ut seven days, at the end of which time symptoms indicative of tetanus were observed and the deceased died from that cause on the following day According to the medical evidence in the case, tetanus was caused by a bacillus, which entered the body through the breach of surface, caused by a wound It was held that there was no reasonable doubt that tetanus, which was the cause of the death of the deceased, was due to the wound inflicted by the accused, that when there was a natural explanation of the appearance of tetanus, it was unreasonable to conjecture that tetanus might have resulted independently of the normal cause, and had been the effect of some rare and unexplained conditions[9]. The accused inflicted a stab with a sharp pointed weapon

[1] *Murrala Kondaiya* (1882) 1 Weir 300
[2] *Apalu* (1923) 1 Ran 285
[3] *Hashim*, (1913) 7 S L R 29, *Saindino*, (1915) 9 S L R 99
[4] *Nuro* (1913) 7 S L R 83
[5] *Fa la* (1928) 29 Cr L J 678.
[6] *Nga Tun Baw* (1907) 14 Burma L R 264, *Ram a*, (1922) 6 L L J 533
[9] *Nga Dwe*, (1904) 10 Burma L R 171

which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum, it was held that his act came within this clause[1].

Assaulting.—A man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part[2]. Where the accused caused the death of another person by giving him unmerciful thrashing with sticks, smashing both bones of each forearm, the right elbow and right knee cap, and the occipital area on the right temporal area of the skull, it was held that he was guilty of murder[3]. The accused killed a person by striking him one blow on the head with a long and heavy bamboo. The nature of the injury indicated that very great force was used. It was held that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the accused intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was guilty of murder[4]. There can be no doubt that a person delivering a violent blow with a lethal weapon like a *dang* (club) on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused[5]. Where the accused committed an unprovoked and cowardly assault upon the deceased rushing out at him by surprise and striking him one blow upon the head with a *lathi* (club) and the blow fractured his skull from temple to temple it was held that the accused was guilty of murder[6]. In the course of a riot the accused attacked and killed a man with dangerous weapons. It was held that the acts of the accused having caused the death of the man, and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result, in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions, they must be taken to have intended to kill the man[7]. If a person stabs another in the abdomen with sufficient force to penetrate the abdominal walls and the internal viscera, he must undoubtedly be held, whatever his station in life, to have intended to cause injury sufficient in the ordinary course of nature to cause death[8].

Intoxication.—Two men met each other in a drunken state, and commenced a quarrel, during which they abused each other. This lasted for about half an hour, when one of them ran to his own house, and came back with a heavy pestle with which he struck the other a violent blow on the left temple causing instant death. It was held that the offence fell within clauses (2) and (3)[9]. Intoxication is no excuse for a man throttling to death another and a weaker man who is intoxicated also[10]. Voluntary drunkenness, though it does not palliate any offence, may be taken into account as throwing light on the question of intention[11]. It may also be considered in estimating the probable effect on the mind of the accused of the words or actions of others, and in determining whether the provocation given was grave and sudden[12]. Where death was caused by an act done while in a state of intoxication, voluntarily induced, and the accused was convicted of causing grievous hurt, it was held that the accused should have been charged with culpable homicide not amounting to murder[13].

4. Clause 4.—'Person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bo-

1 *Hamid*, (1903) 2 L. B. R. 63.
2 *Kutab Ali*, (1911) P. R. No. 14 of 1911.
3 *Samand Singh*, (1918) P. R. No. 3 of 1919.
4 *Nga Khan*, (1921) 11 L. B. R. 115.
5 *Preman*, (1925) 26 P. L. R. 363.
6 *Suraj Prasad*, (1926) 3 O. W. N. 451; *Sheo Prasad*, (1927) 4 O. W. N. 445.
7 *Bali Reddi*, (1913) 37 Mad. 119.
8 *On Shwe*, (1923) 1 Ran. 436; *Nathu*, (1927) 29 Cr. L. J. 369; *Hazrat Gul Khan*, (1927) 29 Cr. L. J. 546.
9 *Dasser Bhooyan*, (1867) 8 W. R. (Cr.) 71.
10 *Akulputtee Gossain*, (1866) 5 W. R. (Cr.) 58; *Nga Thet Hnin*, (1899) P. J. L. B. 550.
11 *Ram Sahoy Bhur*, (1864) W. R. (Gap. No.) (Cr.) 24.
12 *Nga San*, (1904) 2 L. B. R. 204.
13 *Thiyagarayam*, (1882) 1 Weir 301.

dily injury as is likely to cause death ..without any excuse for incurring the risk of causing death'.—This clause cannot be applied until it is clear that clauses 1, 2 and 3 of the section each and all of them fail to suit the circumstances[1] It does not apply to a case in which death ...

to the first three clauses of the section and the exceptions[2] The cases in which this clause has any application are extremely rare, and though it is not easy to attempt to define with any strictness the kind of cases in which that clause comes in, there is one broad distinction between it and the first three clauses—in the first three clauses the important thing is an intention to kill or to hurt, while the fourth clause says nothing about intention[3]

'To cause death merely by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death, does not constitute murder as defined in cl 4 of s 300 but is mere culpable homicide not amounting to murder In order that an act done with such knowledge should constitute murder, it is also necessary that it should be committed 'without any excuse for incurring the risk of causing death or such bodily injury An act done with such knowledge alone is not *prima facie* an act of murder, subject to proof that there is some excuse It becomes an act of murder only if it can be positively affirmed that there was no excuse The requirements of this clause are not satisfied by the

ing the ... that it was done with the knowledg... t it must in all probability cause de... ing to murder under s 299, cl (3) It is culpable homicide because the act causing death is done with the knowledge that the actor is thereby likely to cause death, it is not murder because it does not satisfy both parts of the definition of murder in cl 4 of s 300 Being culpable homicide and not being murder, the act is necessarily culpable homicide not amounting to murder'[4]

This clause also appears to be designed to provide for that class of cases ... ves of many persons in ... are perpetrated with ... example, where death is caused by firing a loaded gun into a crowd (*vide* ill (*d*)), by poisoning a well from which people are accustomed to draw water, by opening the draw of a bridge just as a railway passenger train is about to pass over it In such and the like cases the imminently dangerous act, the extreme depravity of mind and the regardless ness of human life, properly place the crime upon the same level as the taking of life by deliberate intention[5]

'Imminently dangerous'—Where it is clear that the act by which the death is caused is so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as is likely to cause death then unless he can meet this presumption his offence will be culpable homicide, and it would be murder unless he can bring it under one of the exceptions[6] Thus, a man who strikes at the back of another a violent blow with a formidable weapon must be taken to know that he is doing an act imminently

[1] *Ghufar* (1887) P R No 62 of 1887
[2] *Shwe Fin* (1905) 3 L B R 122 12 Burma L R 171 followed in *Nga Nu Ban*, (1906) 13 Burma L R 199
[3] *Abdul Karim* (1914) P R No 3? of 1914
[4] Per Plowden J in *Barkatulla*, (1887) P R No 32 of 1887 p 64
[5] M & M 240
[6] *Jalsheran*, (1868) Unrep Cr C 411

dangerous to the life of the person at whom he strikes and that a probable result of his act will be to cause that person's death[1]. But if the extent of knowledge required under this clause is wanting, the offence will be culpable homicide not amounting to murder. Thus, causing death by branding a thief without the knowledge requisite under this clause is held to be culpable homicide not amounting to murder[2]. Similarly, where a snake charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted, and to show his own skill placed it on the head of a spectator who in trying to put it off was bitten and died, it was held that he was guilty under cl. (3) of s. 299[3]. Where death was caused by a blow with a club and there was reason to think that the accused knew no more than that the blow was possibly dangerous to life, it was held that the conviction should be of culpable homicide not amounting to murder[4]. But where the accused, four in number, all armed with heavy sticks, felled the deceased, who was defenceless and armless, gave him a prolonged beating and inflicted several blows completely smashing the skull, it was held that they were all guilty of murder under this clause although the evidence did not disclose which of the injuries were inflicted by each of the accused respectively[5].

Homicide under the influence of drink.—Where the accused under the influence of liquor assaulted the deceased and literally beat him to death with *lathis* without any direct motive, it was held that they were guilty of murder as they must have known that their act was so "imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death". The Court further held that drunkenness afforded a sufficient excuse for not exacting the extreme penalty of the law[6].

'Without any excuse'.—These words mean without any excuse which a criminal Court administering the criminal law as embodied in this Code could reasonably regard as an excuse. The term 'excuse' also occurs in the explanation to s. 81, and it is there used as synonymous with the expression 'to justify' which seems to indicate that the grammatical meaning of 'exculpating' or 'absolving' was intended to be retained. In this sense the words would mean in the absence of any exculpatory circumstances other than any of those circumstances mentioned in the five exceptions to this section[7]. Where a father sacrificed his son, because wealth had not accompanied his birth, and afterwards partially cut his own throat as a protest against the deity's injustice, he was held guilty of murder[8]. A threat caused by incantations[9], or a belief in witchcraft[10], does not justify the causing of death.

Exceptions.—Unless the act done constitutes, at least, prima facie murder by reason of the intention with which it is found to be done, the Court need not consider the exceptions. Where a person causes the death of another person it is for him to shew that his act was removed from the category of murder by one of the exceptions to the section[11].

1 *Nga Maung*, (1907) 13 Burma L. R. 330.
2 *Khedun Misser*, (1867) 7 W. R. (Cr.) 54.
3 *Gonesh Dooley*, (1879) 5 Cal. 351.
4 *Midde Venkappa*, (1881) 1 Weir 299. See *Umrao*, (1923) 21 A. L. J. 316.
5 *Kanhai*, (1912) 35 All. 329; *Ram Newaz*, (1913) 35 All. 506; *Hanuman*, (1913) 35 All. 360; *Sipahi Singh*, (1922) 45 All. 130. See *Kedar*, (1923) 26 Cr. L. J. 76. In *Gulab*, (1918) 40 All. 686, overruling *Chandan Singh*, (1917) 40 All. 103, the dispute sprang up suddenly and the injuries were inflicted in the heat of passion and so the Court held that the case fell within excep. 4 to s. 300. In a similar case the former Chief Court of the Punjab had held that the offence amounted to grievous hurt: *Ramzan*, (1919) P. W. R. (Cr.) No. 2 of 1920, 21 P. L. R. 8. In *Saindino*, (1915) 9 S. L. R. 99, the case of *Hanuman*, sup., is not followed.
6 *Pal Singh*, (1917) P. W. R. (Cr.) No. 35 of 1917.
7 *Suba*, (1888) P. R. No. 40 of 1888.
8 *Bishendharee Kahar*, (1867) 7 W. R. (Cr.) 64 (100).
9 *Gobadur Bhooyan*, (1870) 18 W. R. (Cr.) 55, 4 Beng. L. R. 101.
10 *Ganduva Nayako*, (1882) 1 Weir 305.
11 *Piare*, (1919) 17 A. L. J. 866.

"The operation of the five exceptions to s 300 is practically somewhat different in respect of an act which falls within one of the first three clauses of s 300, and in respect to an act which falls within the 4th clause These four clauses, it should be remarked, describe exhaustively all the classes of acts to which the five exceptions apply The exceptions operate in this way The existence of all the circumstances described in an exception excuses an act which would otherwise be murder within one of the first three clauses, to the extent that the act constitutes only culpable homicide not amounting to murder and not murder Here the act is *prima facie* murder unless and until an exception is established There is no inconsistency involved in finding that an act falls within one of these clauses and also falls within an exception, for all the circumstances of any exception may co exist with the murderous intention When however an act falls within the 4th clause of s 300, as regards the knowledge with which it is done, and the circumstances constituting an exception exist there is this difference, it cannot consistently be affirmed (at the end of a trial and upon all the evidence) of an act causing death done with the knowledge described in one breath, that it was done without any excuse for running the risk of causing death, and in the next breath, that it was done under circumstances which the law declares to be an excuse for the act of causing death to the extent of preventing the culpable homicide amounting to murder It is a matter of fact and not of law whether a particular act of homicide committed with the knowledge described in cl 4 of s 300 is committed without any excuse As the 4th clause is framed, it need never be determined as a matter of law what circumstances, other than or falling short of the five exceptions, constitute an excuse, it being in each case a question of fact whether from the concomitant circumstances which are proved the just inference is that the act was done 'without any excuse' As this 4th clause is expressed like the three preceding clauses, to be subject to the five exceptions which are legal excuses for murder (as contra distinguished from culpable homicide) it is evident that the words 'without any excuse' in clause 4 do not mean merely 'in the absence of the circumstances described in the exceptions' A Jury or a Court as a Judge of fact is left at liberty to affirm upon proof of circumstances other than or falling short of an exception, not that these circumstances form an excuse for murder, but that in view of them the Jury or Court is unable to affirm that the particular act of homicide was committed without any excuse, and is therefore unable to pronounce the act to be culpable homicide amounting to murder, as defined in cl. 4 of s 300"[1]

5. **Exception 1.—'Grave and sudden provocation'.**—Under this exception the provocation (1) must be grave and sudden, and (2) must have by its gravity and suddenness deprived the accused of the power of self-control In other words [illegible]

[illegible]

evil feelings The authors of the Code observe —

"We agree with the great mass of mankind, and with the majority of jurists ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished, [illegible] not to be punished so severely as murder It ought to be [illegible] men to entertain a peculiar respect for human [illegible] to be [illegible] order to give men a motive for accustom[illegible]

[1] P r Plowden J, in Barkaulla, (1887) P R No 32 of 1887, pp 65 66.

[2] [illegible] Cr L [illegible]

and in some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigour.

"In general, however, we would *not* visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course,—a course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law"[1].

Provocation caused by words or gestures.—According to English law mere words, or gestures, not accompanied with anything of such a serious character as a blow will not, in point of law, be sufficient to reduce the crime to manslaughter[2]. This, however, is a general rule of law, and under special circumstances there may be such a provocation of words as will have the effect of reducing the crimes to manslaughter; for instance, if a husband suddenly hearing from his wife that she had *committed* adultery, and he having had *no idea of such a thing* before, were thereupon to kill his wife, it might be manslaughter[3]. The reason for this exception is that a sudden confession is treated as equivalent to discovery of the act itself[4]. *Mere suspicion of a wife's adultery is not sufficient to reduce a husband's hoimicide* of the suspected person to manlaughter[5]. A statement by the wife that she was going to live with another man, or was about to commit adultery, does not amount to provocation so as to reduce the crime of killing from murder to manslaughter[6]. But the law as to provocation sufficient to reduce homicide to manslaughter is not the same in the case of unmarried as of married persons. "It is a grave offence against the husband for the wife to commit adultery, but there is no such offence when a man is living with another woman. He has no right to object to her going to a house of ill-fame; the case is entirely different"[7].

The authors of the Code remark: "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact, that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blameable excess of a feeling which all wise legislators desire to encourage, more severely than we treat the blameable excess of feelings certainly not more respectable ?...

"A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion; who should deprive some high-born rajput of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt"[8].

The Law Commissioners in their First Report[9] says: "The discretion...is purposely left to the Court to judge whether the provocation be such as would be likely to move a person of ordinary temper to violent passion, not *any person* it is to be understood, but a person of the same habits, manners, and feelings. A dis-

1 Note N, p. 144.

2 *Welsh*, (1869) 11 Cox 336, Foster 290; *James Ellor*, (1920) 15 Cr. App. R. 41, 26 Cox 680.

3 *Rothwell*, (1871) 12 Cox 145; *Jones*, (1908) 72 J. P. 215; *Palmer*, [1913] 2 K. B. 29; *Greening*, (1913) 29 T. L. R. 732, 9 Cr. App. R. 105, 107.

4 *Ibid.*

5 *Birchall*, (1913) 9 Cr. App. R. 91. In this case the Court has observed that the doctrine of *Rothwell's* case (sup.) is not to be extended.

6 *James Ellor*, sup.

7 *Greening*, sup.

8 Note M., pp. 144, 145.

9 Section 271.

creet Judge would probably reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shown to belong to a class sensitive to insults of this kind or otherwise

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injuries to excite violent passion".

Abusive words.—Where the accused struck the deceased a hasty though fatal blow with a stick for abusing his mother[1], where the accused quarrelled with his wife who was dilatory in the performance of her household duties and exchanged abuse with her, and gave her a blow on the side of the head with a heavy hammer which he picked up on the spur of the moment, from the effects of which she died[2], and where the accused, a weak looking youth of about seventeen

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murder was committed Where the accused, a lad of nineteen years, was abused by the deceased and he killed him in anger, it was held that the provocation could not be said to be grave and sudden such as would reduce the offence of murder to that of culpable homicide not amounting to murder[4]

'Whilst deprived of the power of self-control'—The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation, is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (e g, a person afflicted with defective control and want of mental balance) of his self control[5] The act must be done whilst the person doing it is deprived of *self-control* by grave and sudden provocation That is, it must be done under the immediate impulse of provocation[6] The deprivation of the power of self control must continue in order to benefit a man who kills another under circumstances of grave provocation[7] The fatal blow should be clearly traced to the passion arising from that provocation Therefore, if, from the circumstances, it appear that the party, before any provocation given, intended to use a deadly weapon towards anyone who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, and the crime would therefore be murder[8] Again, if the act was done after the first excitement had passed away, and there was time to cool, it is murder[9]

As to the question how long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its

continued from the time of the provocation received to the very instant of the

1 *Sukem Sheikh*, (1864) 1 W. R. (Cr) 23. *Amerra* (1866) P R No 12 of 1866 Mer.

No 203 of 1913

4 *Mangal Singh*, (1925) 27 P L. R. 15

5 *Lesbini*, [1914] 3 K. B 1116.

6 *Nokul Nushyo*, (1867) 7 W R (Cr) 27;

mortal stroke given: for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled, any time before the fatal stroke given; or if in legal presumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty...Such malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature... (The killing will amount to murder) if between the provocation received and the stroke given he (the party giving the stroke) fall into other discourse, or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue any other business or design, not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of the provocation. Again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it; for that shews *deliberation*, which is inconsistent with the excuse of *sudden passion*, and is the strongest evidence of malice. It may be further observed in respect to time, that in proportion to the lapse thereof (time) between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument, or the manner of it...The mere length of time intervening between the injury and the retaliation...is evidence in itself of deliberation".

The question to be determined in every case will be: "Was there time for the blood to cool and for reason to resume its seat"[1]? If there was, the offence will be murder; if there was not, the offence will be culpable homicide not amounting to murder.

'Grave and sudden provocation'.—The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. In determining whether the provocation was so, it is admissible to take into account the condition of the mind in which the offender was at the time of the provocation[2]. But it is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost[3]. It must be shown distinctly not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause[4]. It has, therefore, been held in a series of cases that the commission of adultery by a wife within the sight of her husband is a sufficient grave provocation to bring the husband within this exception if he kills her. In such cases very mild punishment is usually inflicted.

"It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter...For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation"[5].

When the derangement of the mind reaches that degree that the judgment and reason ceases to hold dominion over it—their authority being suspended and yielding place to violent and ungovernable passion—the man who was before a rational being is no longer the master of his own understanding, becomes incapable of cool reflection, and ceases to have control over his passions. It is to such a state

1 *Dhira*, (1877) Unrep. Cr. C. 122.
2 *Khogayi*, (1879) 2 Mad. 122; *A. We*, (1900) 1 U. B. R. (1897-1901) 291.
3 *Devji Govindji*, (1895) 20 Bom. 215; *Sakharam valad Ramji*, (1890) 14 Bom. 564; *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35; *Kesar Singh*, (1877) P. R. No. 10 of 1878; *Ghausar Singh*, (1884) P. R. No. 33 of 1884.
4 *Huri Giree*, (1868) 10 W. R. (Cr.) 26, 1 Beng. L. R. (A. Cr. J.) 11; *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33.
5 1 East P. C. 234.

of mind that the law in judging of acts which cause death, gives indulgent considerations And no mental perturbation or agitation which falls short of this, and leaves sway to reason and the power of self control, can reduce a murder to an offence within the range of this mitigating exception[1].

The provocation must be such as will upset not merely a hasty and hot tempered or hypersensitive person, but one of ordinary sense and calmness[2]

'Sudden'.—Grave provocation, arising from injuries extending over a long series of years, has been held to be insufficient, in the absence of evidence of recent and sudden provocation to reduce the offence to culpable homicide not amounting to murder The accused killed the deceased because, according to his allegations, the deceased had seduced his cousin, had encroached on his ancestral tope and had cut down trees, had persuaded the woman, whose land he cultivated to turn him away, had usurped his share in the village, and had struck him and constantly behaved towards him in an insolent manner, it was held that there was nothing in the circumstances mentioned by him which could be taken as provocation so grave and sudden as to reduce the offence to culpable homicide not amounting to murder[3] Where the accused s concubine refused to abandon another connection and the accuse
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amounting to murder[4] Where the accused found seated on the same cot with his wife her paramour whom he had expelled from his house only a day previously, and he gave a blow with an adze which fractured the skull of his wife and killed her, it was held that the accused must be considered to have received a grave and sudden provocation[5] The refusal of a wife to have connection with her husband is held not to constitute a grave and sudden provocation[6]

The deceased abused the woman of the house of the accused when the accused was not there The accused on being informed of it proceeded to the house of the deceased and challenged him to fight for having abused the woman The deceased came out of the house to meet the accused when some persons intervened and pushed the accused to his house The deceased again came out of his
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'Causes the death of the person who gave the provocation'.—The first exception only applies when the death of the person giving provocation has been caused Cases like those which are not unfrequent of a person under excitement running amock and killing all whom he meets, are not mitigated by this exception.

'Mistake'.—See s 76, *supra* This exception treats the case of a person killed by mistake or accident as culpable homicide not amounting to murder

'Accident'.—See ills (*a*) and (*b*) and s 80, *supra*

6. Proviso I.—'Provocation is not sought or voluntarily provoked'—Where the provocation is sought by the accused, it cannot furnish any defence

[1] M. & M 242
[2] *Khadim Hussain*, (1926) 7 Lah 488, *Sohrab*, (1924) 5 Lah 67
[3]
[4]
[5]
[6]
... *bhai*, (1895) Unrep Cr C. 766, Cr R No 30 of 1895, *Ghazi*, (1921) P. W R. (Cr) No 1 of 1922, 4 U P L. R (L.) 49 Sentence of transportation for life was considered sufficient in such a case
[7] *Guturi Nagalu*, [1927] M W N 706.

against the charge of murder. A and B were at some difference. A bade B a pin out of the sleeve of A, intending thereby to take an occasion to strik wound B, and B did so accordingly, and then A struck B whereof he died. was held to be murder because there was no provocation, since the act was with the consent of A, and because it appeared to be a malicious and delibe artifice to take occasion to kill B[1]. If the accused goes deliberately in searc the provocation sought to be made the mitigation of his offence, the first ex tion will not apply[2].

Where A and B having fallen out, A said he would not strike but w give B a pot of ale to strike him, whereupon B struck and A killed him, it was that A had committed murder as the provocation given was courted by him[3].

As to the definition of the word 'voluntarily', see s. 39, *supra.*

7. **Proviso 2.**—The wording of this proviso does not limit its provis to public servants only, but includes all persons acting according to the comma of law[4]. The Law Commissioners in their First Report[5] say: "We appreh that grave provocation given by any thing done under *cover* of obedience to law, or under *cover* of its authority, or by a public servant, or in defence, *in ex* of what is strictly warranted by the law, in point of violence, or as regards means used, or the manner of using them, and the like, would be admissibl extenuation of homicide under this clause". As to 'public servant', see s. 21, *sup*

8. **Proviso 3.**—A person lawfully exercising the right of private defe may give provocation to the aggressor, but the agressor is thereby not entit to take shelter under the first exception. "For example, take the case of W Tyler...He was a public officer, a tax gatherer, who came 'to exercise his law powers' in that capacity, but doing so in a manner unwarranted and hig offensive, Tyler was excited to 'violent passion', and in his rage killed him on t spot. The Commissioners upon this say, 'so far, indeed, should we be from rank a man who acted like Tyler with murderers, that we conceive that a Judge wo exercise a sound discretion in sentencing such a man to the lowest punishme fixed by the law for manslaughter'"[6]. See ill. (*c*) to Exception 1. As to the rig of private defence, see ss. 96-106, *supra.*

9. **Explanation.**—The Calcutta High Court has laid down that provocati is a question of fact, and where the Judge and assessors have found on the eviden that the accused is not guilty of murder, the High Court cannot interfere, as question of law is involved[7]. But in a similar case the Allahabad High Court h treated this question as one of law[8]. The Allahabad view is not in accor ance with the present state of law in England and is contrary to the princip of this explanation.

Cases.—Grave provocation caused by adulterous intercourse.—Where t accused found a man committing adultery with his wife and killed him[9]; whe the accused under similar circumstances killed both his own wife and the adulterer[10] where the accused killed a person who had come to his house with the intentio of having sexual intercourse with his wife[11] and thereafter killed his wife also[12]

1 1 Hale P. C. 457; 1 East P. C. 239.
2 *Mohan,* (1886) 8 All. 622; *Lochan,* (1886) 8 All. 635.
3 1 Hawk, P. C., c. 13, s. 24, p. 96.
4 *Vide* s. 79, sup.
5 Section 277.
6 *Ibid.*
7 *Huri Giree,* (1868) 10 W. R. (Cr.) 26, 1 Beng. L. R. (A. Cr. J.) 11.
8 *Lochan,* (1886) 8 All. 635.
9 *Asha Gopal,* (1897) Unrep. Cr. C. 932, Cr. R. No. 42 of 1897; *Gour Chunder Polie,* (1864) 1 W. R. (Cr.) 17; *Bhekye,* (1864) 1 W.R. (Cr.) 46; *Maithya Gazee,* (1866) 6 W. R. (Cr.) 42; *Said Ali,* (1890) P. R. No. of 1890; *Fazal,* (1899) P. R. No. 8 of 189 *Sahib,* (1900) P. R. No. 27 of 1900; *Kad Baksh,* (1920) 2 L. L. J. 406; *Maddy,* (167 1 Ventr. 158; *Matthias Kelly,* (1848) 2 C. & K 814.
10 *Sheik Boodhoo,* (1867) 8 W. R. (Cr.) 3 *Mangal Ganda,* (1924) 25 Cr. L. J. 1077.
11 *Teprah Fukeer,* (1866) 5 W. R. (Cr.) 78 *Haneef Fakeer,* (1875) 23 W. R. (Cr.) 50.
12 *Raham Shah,* (1923) 6 L. L. J. 437, 2 P. L. R. 260. In *Hira Lal,* (1921) 22 Cr. L. 341, the father-in-law killed his daughter-in law under similar circumstances.

where the accused saw a man in criminal conversation with his wife on the first [illegible] hook which [illegible] ife was forci- [illegible] presence was [illegible] watched the proceedings from the roof of a house, and on seeing his wife being violated by the physician, jumped down from the roof, and killed him with the sword[2], where the accused found the deceased lying in bed with their sister and killed him[3], where the accused saw his sister and her paramour coming from the *hujra* of a mosque, and, receiving an insulting answer from the latter, there and then attacked and killed him[4], where the accused saw his wife in company with her paramour and killed her[5], it was held that the offence of culpable homicide not amounting to murder was committed Accused's wife led a grossly immoral life After a recent act of unchastity the accused remonstrated with her and instead of showing repent ance she replied that she would continue in the course to which he objected The accused became enraged and struck her with a stick She struggled with him and got hold of his fingers and bit him Accused then lost control of himself, took out a knife and stabbed her repeatedly with it with the result that she died from the injuries It was held that the immediate provocation offered to the accused at the time of his remonstrance coming on the top of all that had gone before was sufficient to reduce the offence of the accused from murder to one of culpable homicide[6].

Confession by a woman of immoral conduct.—Although a confession of adultery by a wife to her husband who, in consequence, kills her, may be such provocation as will entitle the jury in their discretion to find a verdict of *manslaughter* instead of murder, a similar confession of illicit intercourse by a woman who was not the accused's wife but only engaged to be married to him, cannot, if he kills her in consequence, justify such a verdict[7].

The accused, a soldier, returned home on leave and found his home and children in a very neglected condition His wife admitted that *she had been* unfaithful [illegible] in a painful malady [illegible] repeatedly sent for, [illegible] pain. The accused, provoked by the continued neglect of his wife, killed the child It was held that provocation owing to the neglect of the wife, which was set up as a defence, was insufficient to reduce the crime to manslaughter[8].

Provocation [illegible] took [illegible] bamboo with which the accused and [illegible] the bamboo on his neck[10], where [illegible] another connection and the accused, after remonstrating with the woman and leaving her, followed and killed her with a dagger which he had purchased with the intention of killing her[11], where the accused suspecting infidelity in his wife followed

[1] *Boya Munigadu* (1881) 3 Mad. 33, *Hussun*, (1872) P R. No 30 of 1872, *Venkatesan*, (1882) 1 Weir 307

[2] *Ramtahal Kahar*, (1869) 3 Beng L. R. (A. Cr J) 33.

[illegible] 38, [illegible] *Yar*, [illegible]

[6] *Sukhai*, (1925) 26 Cr L J 1228.

[7] *Palmer*, [1913] 2 K. B. 29, *Greening*, (1913) 29 T L. R. 732.

[8] *Simpson*, (1915) 25 Cox 269

[9] *Yasin Sheik*, (1869) 12 W R. (Cr) 68, 4 Beng L. R. 6

[10] *Bechoo Saont*, (1873) 19 W R. (Cr) 2, but see *Abalu Das*, (1901) 28 Cal. 571

[11] *Ghuntappa*, (1882) 1 Weir 308

her with a hatchet one night when, she stealthily left his house, and finding her talking with her paramour, there and then killed her[1]; where the accused, suspecting the widow of his cousin, followed her one night with a sword in hand, to a considerable distance, and finding her actually having connection with her lover, killed her there and then[2]; and where the accused suspected her sister of unchastity and killed her and the man with whom she had come to his house after some conversation[3], it was held that the offence of murder was committed. It was held similarly where the accused suspected his wife and made preparations to catch her with her paramour. A person whom he had asked to be on the watch called him outside his house and pointed out the spot where she and her paramour were together. Thereupon the accused returned to his house, took a heavy wooden pole and going to the place caught the couple in the act, and dealt the paramour a blow on the head which killed him on the spot[4]. The mere singing by the deceased girl of love songs, which reminded the accused (her cousin) of her immoral relations with a stranger, was held not to constitute such grave provocation as would reduce the offence of murder to one of homicide not amounting to murder[5]. No doubt in all these cases there was provocation, but the acts were not committed while the accused were deprived of the power of self-control, they were not the offsprings of the moment, but they were the result of cool and mature consideration after the first excitement had passed away.

Where the accused stated that he had seen the deceased arrange a clandestine meeting between his wife and a young man, whom he actually saw enter his wife's room some time before midnight and again leave it after a considerable interval, and that in consequence of what he saw he had not a wink of sleep that night and was devoid of his senses at the time he killed the deceased, it was held that there was no doubt the accused did actually believe he had ocular proof of his wife's infidelity, and that if he had acted under the immediate influence of such a delusion, the estimate of his guilt must be made upon the basis of the actual existence of the fact in regard to which the delusion existed, and had the accused acted under the immediate influence of such provocation his guilt would have been greatly reduced, but as he did not do so, his offence was murder[6].

Grave provocation.—Where death was caused by an act presumably committed partly under the influence of apprehension from a severe beating from which the accused had just escaped and partly under the influence of provocation caused by the beating, it was held that the conviction should have been of culpable homicide not amounting to murder[7]. Where a husband and wife were not on good terms and on one occasion when the husband asked for pan (beetle) the wife threw dirty rice-water in his face and the husband being enraged took up a stone and struck her on her head and the wife died, it was held that the act of the wife was a grave and sudden provocation and the husband was guilty of culpable homicide not amounting to murder[8].

No grave provocation.—A belief in having been the victim of witchcraft during a period extending over three or four months was held not to constitute provocation sufficient in its nature and suddenness to reduce the offence to culpable homicide not amounting to murder[9]. Where the accused stabbed his wife with a penknife in the region of her breast and caused a wound two and a half inches deep because she refused to go with him to another place immediately but merely

1 *Mohan*, (1886) 8 All. 622; *Gohra*, (1889) P. R. No. 7 of 1890.
2 *Lochan*, (1886) 8 All. 635; *Gohra*, (1889) P. R. No. 7 of 1890.
3 *Rahim Khan*, (1913) 7 S. L. R. 118.
4 *Goshain*, (1920) 18 A. L. J. 851, 2 U. P. L. R. (A.) 281.
5 *Khadim Hussain*, (1926) 7 Lah. 488.
6 *Ghatu Pramanik*, (1901) 28 Cal. 613.
7 *Taturi Jamalaiya*, (1881) Weir (3rd Edn.) 168.
8 *Krishna Chandra Pati*, (1929) 30 Cr. L. J. 720.
9 *Ganduva Nayako*, (1882) 1 Weir 305. See *Ooram Sungra*, (1866) 6 W. R. (Cr.) 82.

asked him to wait for a night, it was held that there was no provocation of a grave and sudden character and that the accused must have intended to cause her death[1] A, B and C had been drinking together and were all more or less intoxicated A pressed C to drink more and on his refusing A got angry and drew a clasp knife on C, B the deceased, interfered and, after vainly remonstrating with A, hit him with a branch of a tree on the head Getting incensed at this A inflicted on B a fatal blow It was held that as the deceased hit the accused with the sole object of preventing him from stabbing C in the exercise of the right of private defence as laid down in s 97, this provocation would not bring the accused's act under the first exception to this section[2] Throwing of a clod of earth by a child of three or four was not sufficient provocation for a man causing her death by swinging her round his head and dashing her against the ground[3] Where the accused left his wife for eight months exposed to temptation during which period she misbehaved and became pregnant and on returning home he killed her lover when he was asleep, it was held that the accused was not entitled to a lenient treatment and must receive a capital sentence, inasmuch as the murder could not be said to have been committed on grave and sudden provocation[4] The accused asked his wife to sever her connection with her paramour but she declined to do so Thereupon there was a quarrel between the accused and his wife in the course of which he lost his temper and in a fit of anger killed his wife It was held that there was no grave and sudden provocation within the meaning of this exception, but there was provocation entitling him to the lesser penalty of transportation for life[5]

10 **Exception 2 —Exceeding the right of private defence**—This exception provides for the case of a person who exceeds the right of private defence If the excess is intentional the offence is murder, if unintentional, it is culpable homicide The authors of the Code say Wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence

The chief reason for making this separation is that the law itself invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence It prohibits such homicide indeed but it authorizes acts which lie very near to such homicide, and this circumstance we think, greatly mitigates the guilt of such homicide

That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished, would be most dangerous The law punishes and ought to punish such killing, but we cannot think that the law ought to punish such killing as murder, for the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage, to give the assailant a cut with a knife across the fingers which may render his right hand useless to him for life, or to hurl him downstairs with such force as to break his leg, and it seems difficult to conceive that circumstances which would be a full justification of any violence short of homicide should not be a mitigation of the guilt of homicide That a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the Code if he kills the same assailant that there should be only a single step between perfect innocence and murder between perfect impunity and liability to capital punishment, seems unreasonable In a case in which the

1 *Syed Bitcha Sahib* [1913] M W N 5 6.
2 *Nga Hla Aung* (1910) 4 B L T 221
3 *Bhani* (1899) 1 O D 489
4 *Pateshwari Prasad*, (1928) 29 Cr L J 465.
5 *Ibrahim*, (1927) 29 Cr L J 347

law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death.

"It is to be considered also that the line between those aggressions which it is lawful to repel by killing, and those which it is not lawful so to repel, is in our Code, and must be in every Code, to a great extent an arbitrary line, and that many individual cases will fall on one side of that line which, if we had framed the law with a view to those cases alone, we should place on the other. Thus we allow a man to kill if he has no other means of preventing an incendiary from burning a house; and we do not allow him to kill for the purpose of preventing the commission of a simple theft. But a house may be a wretched heap of mats and thatch, propped by a few bamboos, and not worth altogether twenty rupees. A simple theft may deprive a man of a pocket-book which contains bills to a great amount, the savings of a long and laborious life, the sole dependence of a large family. That in these cases the man who kills the incendiary should be pronounced guiltless of any offence, and that the man who kills the thief should be sentenced to the gallows, or, if he is treated with the utmost lenity which the Courts can show, to perpetual transportation or imprisonment, would be generally condemned as a shocking injustice. We are, therefore, clearly of opinion that the offence which we have designated as voluntary culpable homicide in defence ought to be distinguished from murder in such a manner that the Courts may have it in their power to inflict a slight or a merely nominal punishment on acts which, though not within the letter of the law which authorizes killing in self-defence, are yet within the reason of that law"[1].

The onus of proving private defence is on the accused[2].

As to 'good faith', see s. 52, *supra*.

Cases.—No right of private defence.—Where a person wilfully killed another whilst endeavouring to escape, after having been detected in the act of house-breaking by night for the purpose of theft[3], and where a person pursued a thief and killed him after a house-trespass had ceased[4], it was held that they had committed murder and they did not come under this exception. A Head Constable, in order to extort money from certain gipsies, unlawfully ordered one of them to be bound and taken away. There was a great disturbance caused thereby and the gipsies advanced in a threatening manner towards the constable, upon which he fired a gun at the crowd and killed one of them. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased, had he released the gipsy he had unlawfully arrested and withdrawn himself, or had he effected his escape. It was held that the Head Constable had no right of private defence against the acts of the gipsies and that he was guilty of murder[5]. Where the accused finding a feeble old woman stealing his crop, beat her so violently that she died from the effect of the attack, it was held that he was guilty of murder[6]. Similarly, where the accused went on a moonlight night armed with heavy clubs and assaulted two persons who were cutting their rice crop, one of whom received six distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot, it was held that they were guilty of murder[7]. The accused who was watching his field (some of the grain of which had on previous occasions been stolen) saw the deceased cutting his corn. On being pursued (the night being dark) the deceased ran his head against a tree and fell. The accused then hit him recklessly with a stick (which was not proved to be a very formidable weapon) while on the ground, and fractured his skull in two places, causing death. It was held that he was guilty of culpable homicide[8].

1 Note M. pp. 147, 148; *Ram Lal*, (1927) 3 Luck. 244.
2 *Asiruddin Ahmed*, (1904) 8 C. W. N. 714.
3 *Durwan Geer*, (1866) 5 W. R. (Cr.) 73.
4 *Balakee Jolahed*, (1868) 10 W. R. (Cr.) 9.
5 *Abdul Hakim*, (1880) 3 All. 253.
6 *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33.
7 *Mammun*, (1916) P. R. No. 35 of 1916.
8 *Bag*, (1902) P. R. No. 29 of 1902.

Threats of incantations give no right of defence.—The accused and the deceased met one day at a liquor shop, and there drank together They afterwards walked in company, and on their way an altercation took place in respect of the deceased having caused the death of the accused's four children by incantations The deceased admitted that he had so caused their death, and added that he would also bring about the death of the accused by causing the accused to be taken by a tiger The accused, thereupon, killed the deceased with several blows of a heavy club It was held that the accused had no reasonable apprehension of danger to himself from the threats of the deceased and that his case was not taken out of the category of murder by reason of this exception[1].

Right of private defence exceeded.—Where a thief was seen with half his body and head through the wall of a house occupied by women except the accused and his young idiot son, and the accused suddenly caught up a sort of poleaxe, and with it struck the thief five times on his neck and nearly cut off his head, it was held that the accused inflicted more hurt than was necessary for defence and was guilty of culpable homicide, though not of murder[2] A cry of thief being unjustly raised against the accused, he turned and shot dead one of his pursuers The accused was held to have committed culpable homicide and not murder[3] The accused, who was appointed to protect the crops of a field, went round one night and saw in the darkness a man cutting the crop The thief on seeing the accused rose Upon this the accused, who was armed with a club, at once struck him a blow on the head felling him to the ground, with the result that he died that very night It was held that the accused had exceeded the right of private defence of property, and that he was guilty of culpable homicide not amounting to murder[4] Where the deceased who was of a stronger physique than the accused picked up a clod of earth to strike the accused who under the circumstances struck the deceased with hatchet blows, it was held that the accused had a reasonable apprehension of hurt being caused to him but he must be taken to have exceeded his right of private defence[5] Where the deceased was either causing mischief or committing trespass on the property of the accused and in the act the accused struck the deceased a blow which caused his death, it was held that the accused had the right to defend [illegible] to grievous hurt, [illegible] to fracture a skull

11. Exception 3.—Public servant or person aiding him exceeding the powers given by law.—This exception protects a public servant, or a person aiding a public servant acting for the advancement of public justice, if either of them exceed the powers given to them by law and cause death It gives protection so long as the public servant acts in good faith, but if his act is illegal and unauthorized by law, or if he glaringly exceed the powers given to him by law, the exception will not protect him

As to 'good faith', see s 52, *supra*, and as to 'public servant', see s 21, *supra*.

Cases.—Public servant exceeding the power given by law.—Where the accused, fearful of being punished if they allowed an outlaw to escape, and thinking that they were acting lawfully, in furtherance of a plan arranged for them by a Police Constable, and the *lumberdar* of a village, for the capture of the outlaw, for whose arrest a reward had been offered, and, in pursuance thereof, killed him while he was endeavouring to escape, it was held that the offence committed came under this exception and amounted to culpable homicide not amounting to murder[7].

1 *Gobadur Bhooyin*, (1870) 13 W R (Cr) 55, 4 Beng L R App. 101
2 *Fuleera Chamar*, (1866) 6 W R (Cr) 50
3 *Sher Baz*, (1879) P R No 1 of 1880
4 *Kallu*, (1921) 22 Cr L J 711, *Ram Lal*, (1927) 3 Luck. 244
5 *Ghulam Rasul*, (1926) 27 P L R 430
6 *Natha Singh*, (1926) 28 P. L. R 279
7 *Aman*, (1873) 5 N W. P. 130, *Fakira gadu*, (1882) Weir (3rd Edn) 180

Public servant doing an unlawful act.—Where death was caused by a constable under the orders of a superior officer, it being found that neither he nor his superior officer believed that it was necessary for the public security to disperse certain reapers by firing on them, it was held that he was guilty of murder, since he was "not protected in that he obeyed the orders of his superior officer"[1].

12. Exception 4.—'Death caused without premeditation in a sudden fight in the heat of passion without taking undue advantage or acting in a cruel manner'.—The exception directs the attention to the distinction between the present and some of the preceding exceptions. In many cases of mutual contest, homicide caused by the person who received the first blow or the provocation, would, under those exceptions, have been extenuated. But if that person's death had been caused by his opponent, the offence would not have been within the reach of any mitigating provision. The present exception is meant to apply to cases in which, *notwithstanding that a blow may have been struck or some* provocation given in the origin of the dispute,—or in whatsoever way the quarrel may have originated,—yet the subsequent conduct of both parties puts them, in respect of guilt, upon an equal footing. For, there is a mutual combat, and blows on each side. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated warms at every subsequent stroke, and the voice of reason is heard on neither side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degrees of blame with reference to the state of things at the commencement of the fray[2].

This exception requires three things:—

(1) Sudden fight;
(2) absence of premeditation; and
(3) no undue advantage.

It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first; provided the occasion be sudden, and not urged as a cloak for pre-existing malice[3].

To bring a case within this exception all the facts mentioned in it must be found[4]. If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage and is not entitled to the benefit of this exception[5]. This exception applies to cases in which there is no wish to kill or to hurt[6].

'Sudden'.—This word implies that the fight should not have been prearranged. A fight is not *per se* a palliating circumstance, only an unpremeditated fight is such[7]. If, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and, in the course of the scuffle, after the parties are heated by the contest, one kills the other with a deadly weapon, it is culpable homicide and not murder[8]. The lapse of time between the quarrel and the fight is therefore a very important consideration. If there intervenes a sufficient time for passion to subside and for reason to interpose, the killing will be murder[9]. The occasion must not only be sudden, but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is peculiarly requisite where the attack is made with deadly or dangerous weapons[10]. If A has formed a deliberate design to kill B, and, after this, they meet and have a quarrel, and many blows pass, and A kills B, this will be murder, if the jury are of opinion that the death was in consequence of previous malice, and not of the sudden provocation[11].

1 *Subba Naik*, (1898) 21 Mad. 249.
2 M. & M. 261; *Karam Singh*, (1926) 7 L. L. J. 93, 27 P. L. R. 132.
3 1 East P. C. 241.
4 *Akal Mahomed*, (1865) 3 W. R. (Cr.) 18.
5 *Po Kin*, (1904) 2 L. B. R. 320.
6 *Nawab*, (1914) P. R. No. 31 of 1914.
7 *Rohimuddin*, (1879) 5 Cal. 31.
8 *William Snow*, (1776) 1 Leach 151.
9 Foster, 296.
10 1 East P. C. 242.
11 *William Kirkham*, (1837) 8 C. & P. 115.

"If a person receives a blow, and immediately avenges it with any in
be only
arising
nd bad
should
traced
to the influence of passion arising from that provocation. If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms the 'malice,' in the definition of wilful murder, then the offence would not be manslaughter Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows, then you could not attribute that act to the passion of anger, and the offence would be murder And so if you find that, before the stroke is given, there is a determination to punish any man who gives a blow with such an instrument as the one which the prisoner used (viz, a sword stick), because, if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such a wound to the passion of anger excited by that blow, for no man who was under proper feelings,—none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument"[1] "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter But it depends upon the time elapsing between the blow and the injury, and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter But if you think that the act was the act of a wicked, malicious, and diabolical mind, then you will find him guilty of murder"[2]

Duelling does not come within this exception It is not protected at all For it is never without premeditation Where two persons deliberately agree
p himself
declined
but only
culpable
in defiance of the laws, he must at his peril abide the consequences[3] All persons who are present, encouraging and promoting a duel that results in death, will be guilty of murder[4]

Without the offender's having taken undue advantage or acted in a cruel or unusual manner.—Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under this Exception

"When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues—it is manslaughter, and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only.

[1] Per Parke, B, in *John Thomas*, (1837) 7 C. & P 817, 818 819

[2] Per Lord Tenterden in *Lynch*, (1832) 5 C & P 324 325

[3] 1 East P C 242

[4] *Cuddy*, (1843) 1 C. & K. 210 *M[illegible]* (1833) 6 C. & P 103, *Per[illegible]* (1803) 3 East [illegible] *Young* (1838) 8 C. & P 644 Persons aiding and abetting a prize fight are guilty of [illegible] *Coney*, (1842) 8 Q B D 534

But if a party enters a contest, dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder"[1].

Cases.—Sudden fight.—An unpremeditated assault (ending in an affray in which death is caused) committed in the heat of passion upon a sudden quarrel (it being immaterial which party offers the provocation, or commits the first assault) comes within this exception[2]. Where the accused while smarting from a severe blow from a stick in the midst of a sudden fight and possibly apprehensive of further violence, finding a knife at hand, took it up, and in the *melee* inflicted the wound which caused the death of the deceased, it was held that the case fell within this exception[3].

A conviction for murder was held to be wrong in a case where the accused taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent, and knocked him over[4]. Where a person, under heat of passion, on a sudden quarrel, snatched up a log of a heavy wood and struck another with it on a vital part with so much force and vindictiveness as to cause that other person's death almost on the spot, it was held that the offence committed was culpable homicide not amounting to murder[5]. A dispute having suddenly arisen concerning the cutting of a sugar-cane crop, three men armed with *lathis* attacked one of the men who was engaged in cutting the crop and beat him so severely that he died, his skull being broken in three places. It did not appear which of the injuries had been caused by which of the assailants who were acting in concert. It was held that the accused were guilty of culpable homicide not amounting to murder inasmuch as the matter was sudden and the injuries had been inflicted in the heat of passion[6]. Where, in the course of a sudden fight, the deceased grappled with the accused from behind, and the accused then struck at him with his pocket knife without any deliberate aim, it was held that the accused did not intend to cause death or to inflict such injury as was likely to cause death but as he must have known that a blow with a weapon of this kind was likely to cause death, the offence fell under cl. (2) of s. 304[7].

Undue advantage.—Where a person, during the course of a sudden fight, without premeditation and probably in the heat of passion, took undue advantage and acted in a cruel manner in using a knife or a dagger, it was held that there was no ground for holding that his act did not amount to murder[8]. If two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such a weapon must be held to take an undue advantage and not entitled to the benefit of this exception[9]. When a man uses a hatchet on another unarmed man and strikes him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, he cannot claim the protection of this exception[10]. Fighting under an advantage if death ensues, is always murder[11]. The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both

1 Per Bayley, J., in *Whiteley*, (1829) 1 Lewin 173, 175.
2 *Zalim Rai*, (1864) 1 W. R. (Cr.) 33; *Ameera*, (1866) P. R. No. 12 of 1866.
3 *Somiruddin*, (1875) 24 W. R. (Cr.) 48; *Feroz*, (1924) 26 P. L. R. 620.
4 *Kewul Dosad*, (1864) W. R. (Gap. No.) (Cr.) 36.
5 *Rajoo Ghose*, (1867) 7 W. R. (Cr.) 70 [106]. (In the original Edition of the Weekly Reporter there is a misprint in numbering the pages). *Nga Shan Gyi*, (1885) S. J. L. B. 371.
6 *Gulab*, (1918) 40 All. 686, *Chandan Singh*, (1917) 40 All. 103, dissented from; *Bikram Singh*, [1929] A. L. J. 508.
7 *Jagat Singh*, (1925) 8 L. L. J. 51.
8 *Nga Kaman*, (1903) 9 Burma L. R. 145; *Nga Shwe Tha U*, (1884) S. J. L. B. 271; *Allah Ditta*, (1920) 4 L. L. J. 276; *Kesar Sing*, (1924) 6 L. L. J. 527.
9 *Po Kin*, (1904) 2 L. B. R. 320; *Amarnath Singh*, (1928) 30 Cr. L. J. 173.
10 *Kanshi*, (1926) 8 L. L. J. 188; *Sher Alam*, (1927) 28 Cr. L. J. 415; *Madaru*, (1927) 5 O. W. N. 29.
11 *Whiteley*, (1829) 1 Lewin 173.

the lungs and of the spleen It was held that they were guilty of murder as the intention was clear whether to kill or to cause dangerous injury[1]

Where the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, it was held that their action did not come within this exception[2]

13. Exception 5—Death caused by consent of persons above the age of eighteen years.—The authors of the Code give the following reasons for not punishing homicide by consent so severely as murder "In the first place, the motives which prompt men to the commission of this offence, are generally far more respectable than those which prompt men to the commission of murder Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freed man who in ancient times held out the sword that his master might fall on it, the high born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins

"Again, this crime is by no means productive of so much evil to the community as murder One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent It does not produce general insecurity It does not spread terror through society When we punish murder with such signal severity, we have two ends in view, one end is, that people may not be murdered, another end is, that people may not live in constant dread of being murdered The second end is perhaps the more important of the two For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population, but the life of every human being would be passed in constant anxiety and alarm This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed unless he shall first be convinced that it is his interest to consent to it We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles No number of suicides, or of homicides [illegible] produce [illegible] he object of each party is to kill his assailant

This Exception refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result, but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by [illegible]

next with reference to the person or persons authorized, and as to each of those

[1] *Nawab* (1914) P R No 31 of 1914
[2] *Adil Mohamed*, (1908) 8 C. L. J 561
[3] Note M, pp 145, 146
[4] *Rohimuddin*, (1879) 5 Cal. 31. See *Po Set*, (1910) 5 L. B R 160

some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. It must be found that the person killed, with a full knowledge of the facts, determined to suffer death, or take the risk of death; and that this determination continued up to, and existed at, the moment of his death[1].

The consent given by the victim who though not yet eighteen is approaching that age mitigates the gravity of the offence of murder in the sense of making it unnecessary to pass the extreme sentence of death[2].

Consent.—It must be such as has been defined in s. 90, *supra*.

Illustration.—The case supposed in the illustration to this exception is one of the offences expressly made punishable by s. 305.

English law.—Homicide is neither justified nor extenuated by reason of any consent given by the party killed. Exception 5, therefore, is a departure from the English law.

Cases.—Death caused by consent.—Where the accused caused a pile to be lighted, and persuaded a *suttee* to reascend it, after she had once left it, and she was burnt[3], where the accused acting upon the express desire of an adult emasculated him, and death ensued owing to the rough manner of the operation[4]; where the accused was repeatedly requested by his wife, who was over-whelmed with grief at the death of her child, to kill her, did kill her one night while she was asleep[5]; where certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake, and from the effect of the bite three of such persons died[6]; and where the accused finding that his life had become unbearable owing to domestic troubles, decided to take his own life and began to load a gun for the purpose but this having come to the knowledge of his wife, she pressed him hard to kill her first, and in consequence of what she said and the taunts then given to him by his parents, he took her life by firing a shot at her[7]; it was held in all those cases that the accused came under this exception, because in all of them the element of consent had entered in a greater or less degree. The accused killed his step-father, who was an infirm old man and an invalid, with the latter's consent, in order to get three innocent men, his own enemies, hanged. It was held that his act fell within this exception and he was punishable under s. 304[8].

Premeditated fight.—This exception was held not to apply to a case where two bodies of men, for the most part armed with deadly weapons, deliberately entered into an unlawful fight, each being prepared to cause the death of the other, and aware that his own might follow, but determined to do his best in self-defence, and in the course of the struggle death ensued[9]. In a case in which it was found that all the accused were armed with deadly weapons and were guilty of rioting, that the fight was premeditated and prearranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of this exception. It was held that upon such finding the case did not fall within the exception[10].

1 *Nayamuddin*, (1891) 18 Cal. 484, F. B., overruling *Samshere Khan*, (1880) 6 Cal. 754, in which it was said that this Exception protected duelling.
2 *Musum Ali*, (1928) 117 I. C. 890.
3 *Saheblall Reetlool*, (1863) 1 R. J. P. J. 174.
4 *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.
5 *Anunto Rurnagat*, (1866) 6 W. R. (Cr.) 57.
6 *Poonai Fa'temah*, (1869) 12 W. R. (Cr.) 7, 3 Beng. L. R. 25.
7 Per Aston and Heatton, JJ., in *Purushotam Nilkant Kasbekar*, Criminal Confirmation Case No. 9 of 1906, decided on August 2, 1906 (Unrep. Bom.).
8 *Ujagar Singh*, (1917) P. R. No. 45 of 1917.
9 *Rohimuddin*, sup.
10 *Nayanuddin*, sup.

Death caused by the voluntary act of the deceased resulting from fear of violence —"If a man creates in another man s mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures him self, the person who creates such a state of mind is responsible for the injuries which result'[1] "If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed[2] "A man may throw himself into a river under such circumstances as render it not a voluntary act, by reason of force, applied either to the body or the mind It becomes then the guilty act of him who compelled the deceased to take the step But the apprehension must be of *immediate violence, and well grounded, from the circumstances by which* the deceased was surrounded not that you must be satisfied that there was *no* other way of escape but that it was such a step as a reasonable man might take'[3] The act of the person attacking will, in such a case, amount to murder Where the deceased was on horse back, and the accused struck him with a stick, and the deceased, from a well grounded apprehension of a further attack, which would have endangered his life spurred his horse which became frightened and threw him giving him a mortal fracture it was held that the accused was guilty of murder[4] Similarly, where the accused in unlawfully assaulting a girl, who at that time had in her arms an infant so frightened the infant that it had convulsions, although previously healthy and from the effects of which it eventually died in about six weeks it was held that the accused was guilty of manslaughter[5]

It is however, submitted that the wording of this section and s 307 does not seem to cover such acts

Culpable homicide by causing death of person other than person whose death was intended

301 If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause

COMMENT

The doctrine inculcated in this section is called, by Hale and Foster, a transfer of malice Others describe it as a transmigration of motive Coke ca it coupling the event with the intention and the end with the cause. If the [illegible] [illegible] was to be li[illegible] [illegible] killer had [illegible]

It is common knowlege that a man who has an unlawful and [illegible] intent against another, and [illegible] third [illegible] is guilty of what the law [illegible] offender is doing an unlav[illegible] malice, and that is enough[6]

[1] Per Lord Coleridge C J in *Halliday* (1890) 61 L T 701 702, *Martin* (1881) 8 Q B D 54

[2] Per Denman J, in *Towers* (1874) 12 Cox 530 533

[3] Per Erskine J in *Pitts* (1842) Car & M. [illegible]

[4] *Halmer* [illegible]

[5] *Towers* [illegible]

[6] Per Lord C[illegible] C [illegible] [illegible]

Where a mistake is made in respect of the person, as where the offender shoots at A supposing that he is shooting at B, it is clear that the difference of person can make none in the offence or its consequences; the crime consists in the wilful doing of a prohibited act; the act of shooting at A was wilful, although the offender mistook him for another.

Similarly, there will be no difference where the injury intended for one falls on another by accident. If A makes a thrust at B, meaning to kill, and C throwing himself between, receive the thrust and die, A will answer for it as if his mortal purpose had taken place on B.

The same principle is applicable where through accident, or the mistake of a party not privy to the criminal design, the mischief falls either on a person not intended, or on the party intended, but in a different manner from that intended. A designing to poison her own child, who lived in the house of B, delivered to B a bottle of poison, with directions to administer a portion of it to the child; B, not knowing that the bottle contained poison, left it on the mantel-piece in her house, having forgotten to administer any portion of it to the child; during her absence C, the son of B (a child of five years old), finding the bottle on the mantel-piece, administered a portion to the child of A, and the child died of the poison, it was held that A was guilty of murder[1].

If A counsel B to poison his wife, B accordingly obtains poison from A and gives it to his wife in a roasted apple, the wife gives it to a child of B not knowing it contained poison, who eats it and dies, this is murder in B though he intended nothing to the child[2].

Scope.—This section has given rise to a difference of opinion as to its scope. In a Madras case[3] the accused, Suryanarayana, with the intention of killing one Appala Narasimhulu, on whose life the accused had effected large insurances without his knowledge and in order to obtain the sums for which he was insured, gave him some sweetmeat (*halva*), in which a poison containing arsenic and mercury in soluble form had been mixed. Appala ate a portion of the sweetmeat, and threw the rest away. This occurred at the house of the accused's brother-in-law where the accused had asked Appala to meet him. One Rajalakshmi, the daughter of the accused's brother-in-law, aged eight or nine years, picked up the sweetmeat without the knowledge of the accused and ate it and gave some to another little child who also ate it. The two children died from the effects of the poison but Appala Narasimhulu, though the poison severely affected him, eventually recovered. The accused was sentenced to transportation for life by the Sessions Judge for having attempted to murder Appala Narasimhulu, but he was acquitted on the count of murdering the two children. On appeal against the acquittal, Benson and Abdur Rahim, JJ., held that the accused was guilty of murder, but Sundara Aiyar, J., held that he was not. Benson, J., observed: "The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to a section does. The rule could not well be stated as an explanation to either s. 299 or s. 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of s. 299 yet is, as we have seen, deducible from the generality of the words 'causes death' and from the illustration to the section; and the rule then goes on to state that the *quality* of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge

[1] 7th Parl. R. 27; *Michael*, (1840) 2 Mood. Cr. C. 120.

[2] 1 Hale P. C. 436.

[3] *Suryanarayanamoorty*, [1912] M. W. N. 136, 139, 143, 149, 22 M. L. J. 333, 338, 343, 352, 11 M. L. T. 127, 131, 135, 141.

which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the ss 299 and 300 though not, perhaps, lying on their very surface" Sundara Aiyar, J, said —"That section apparently applies to a case where the death of the person whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact, occur but the death of some one else occurs as the result of the act done by him It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, has occurred Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that hi

all the others

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has reference to a case where a person intending to cause the death of A, say by striking or shooting him, kills B because B is in the place where he imagined A to be, or B rushes in to save A and receives the injury intended for A The reason for not exculpating the wrong-doer in such case is that he must take the risk of some other person being in the place where he expected to find A, or, of some one else intervening between him and A The section is a qualification of the rule laid down in s 299 and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result If a person is intended by s 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and what is more important, s 301 would not be limited to cases where the death of the particular individual intended or *foreseen does not occur* The *general theory of the criminal* law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue, for otherwise he could not be said to have caused the effect 'voluntarily', and a person is not responsible for the involuntary effects of his acts Illustrations A and B in my opinion support his view Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily and s 321 shows that hurt to the particular person in question must have been intended or foreseen In the eye of the law, no doubt,

arise in the ordinary course of events to result from the act This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring, when the effect is not due merely to physical causes set

law as the responsible cause of a certain result when that result, as it often happens, is due to series of causes We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause But it may be observed that it cannot be a sufficient criterion in

this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of the sweetmeat by Apala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause".

The Allahabad High Court has approved of the view of the majority of the learned Judges in the Madras case. A woman was carrying on an intrigue with a man who gave her some poison to administer to her husband. She prepared sweetmeats mixed with the poison which was eaten by one M who died as the result thereof. The husband and three others also partook of the sweetmeats and suffered considerably but did not die. She, however, intended to kill her husband and not M. It was held that she was guilty of murder[1].

CASES.

Where the accused intending to kill the husband of a woman, with whom he was carrying on an adulterous intrigue, waylaid him in the dusk, but by mistake killed a third party who came along the road[2]; where the accused intending to kill B, killed A by a blow with a highly lethal weapon whom he had no intention of killing[3]; and where the accused gave some poisoned ricewater to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison[4], it was held in all these cases that the offence committed was that of murder.

Punishment for murder.

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

COMMENT.

Where the legislature recognizes two sorts of punishment it implicitly recognizes the existence of degrees in crimes technically the same. These degrees are to be determined by the circumstances of the case, and among them, and perhaps the most important of them, are the state of mind of the offender and the degree of moral obliquity displayed by the act. There is an undoubted connection, though one not easily formulated, beteween the ethical quality of a crime and its proper punishment.

"Although the law has provided an alternative punishment, either is not to be passed indifferently at the discretion of a Judge; but...where the accused has been found guilty of deliberate murder, he must pass sentence of death, and... the minor sentence should only be awarded when there is some extenuating circumstance, some excuse which, though the law does not regard it as sufficient to reduce the killing to the offence of culpable homicide not amounting to murder, still is ground for looking leniently on the act"[5].

1 *Jeoli*, (1916) 39 All. 161, distinguished in *Khelawan*, (1926) 27 Cr. L. J. 1400, so far as punishment is concerned.

2 *Government* v. *Govinda Ballajee*, (1828) 1 M. Dig. N. S. 125.

3 *Phomonee Ahum*, (1867) 8 W. R. (Cr.) 78; *Suba*, (1927) 29 Cr. L. J. 280.

4 (1869) 12 W. R. (Cr. L.) 2.

5 Per Wilkinson, J., in *Kamal*, (1873) P. R. No. 13 of 1873.

According to the Bombay High Court the sentence consequent upon a conviction for murder must be death If there exist any grounds for mercy, that circumstance will have to be considered by the Crown or its executive minister, and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law[1] But the law lays down two sentences in cases of murder, and naturally the Court leans towards the more lenient sentence if it is consistent with the ends of justice[2] The Calcutta High Court is of opinion that attention should be paid to the age of the accused Where, therefore, a girl of sixteen was charged with deliberately killing her husband by administering arsenic she was transported for life in consideration of her age[3] The sentence of death is not passed if there are some extenuating circumstances Where the accused murdered his wife under an unfounded suspicion as to her chastity, the sentence was reduced to transportation[4] When convicting of murder the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded regard being had to the circumstances of the particular case[5] The fact that the accused had the capital sentences suspended over their heads for nearly s

The sentence of death

in the first instance o

should be carried out at the time final orders are passed[6]

The Calcutta High Court is also of opinion that if two Judges of the Division

The Patna High Court has held that in deciding as to whether some or all of a number of persons are to be sentenced to death after a conviction for murder, prima facie all the persons convicted should be sentenced to the extreme penalty and it is only where special circumstances are shown in favour of any individual that the Court sentences such individuals to the alternative punishment of transportation for life[8]

In Burma, where knives are freely used on the lightest occasion, it is unsafe to lay down as a general rule that mere absence of premeditation or deliberate intent to kill is a good ground for abstaining from passing a capital sentence in a case where a knife is used To justify the passing of a sentence of transportation for life in cases of murder the Judge should find that there are really extenuating circumstances not merely an absence of aggravating circumstances The extreme sentence is the normal sentence, the mitigated sentence is the exception It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so[9] It is not *necessary to pass sentences of death on all the persons taking part in an ordinary* murder as distinguished from murder in dacoity A death sentence should be reserved for the principal offenders[10] In a Burma case the following are stated as some of the reasons which appear to be sufficient for not passing a capital sentence upon a conviction under s 302 —

T of age

mit murder, the offence falling

[1] *Abdurrahman Said* (1896) Unrep Cr C. 852

[2] Per Crump J in *Shafi Ahmed*, Case No 22 2nd Criminal Sessions decided on May 23 1925 (Unrep Bom)

[3] *Jasha Bewa* (1907) 11 C. W N 904

[4] *Dina Bandhu Moitra*, (1903) 8 C. W N 218.

[5] *Dewan Singh* (1895) 22 Cal. 805.

[6] *Autar Singh*, (1913) 17 C. W N 1213

[7] *Dukari Chandra Karmakar*, (1929) 33 C. W N 1226.

[8] *Shafi Khan*, (1929) 30 Cr L. J 237

[9] *Nga Tha Sin*, (1902) 1 L. B R. 216, *Nga Shwe Gon*, (1903) 10 Burma L. R. 123. See also *Shwe Cho* (1903) 3 L. B R 111

[10] *Mi Shabi*, (1890) P J L. B. 564

(3) The murder, though intentional, having been committed without premeditation, and in the heat of passion, without special brutality.

(4) The murder having been committed upon grave provocation, the provocation not being both grave and sudden so as to reduce the offence to culpable homicide not amounting to murder.

(5) Reasonable doubt as to the sanity of the offender at the time of com mitting murder, actual insanity not being proved.

(6) Where murder has been committed by more than one person, and it appears that the offender acted under the instigation of another, and did not take a principal part in committing the murder.

This is not intended to be an exhaustive statement of reasons for not passing a capital sentence. In each case the Sessions Judge must exercise his own discretion with deliberation. The extreme penalty of the law should be reserved for cases of deliberate murder, for cases where murder is committed to facilitate the commission of some other offence or to avoid arrest for an offence and for other heinous cases of murder"[1]. In passing sentence on a youth the general principle to be observed is that ordinarily youth is in itself an extenuating circumstance. This circumstance must be taken into consideration by the Court in exercising the discretion vested by this section[2].

Punishment where doubt exists.—L, C, K and D conspired to kill S. In pursuance of such conspiracy, L first, and then C, struck S on the head with a club, and S fell to the ground. While S was lying on the ground, K and D struck him on the head with their club; it was held that, inasmuch as K and D did not commence the attack on S, and it was doubtful whether S was not dead when they struck him, transportation for life was an adequate punishment for their offence[3].

PRACTICE.

Evidence.—Prove (1) that the death of a human being has actually taken place.

That a murder has been committed by some one, is essentially necessary to be proved.

(2) That such death has been caused by, or in consequence of, the act of the accused.

Where there is no evidence to prove that the accused had anything to do with the death of the deceased, no conviction could stand[4].

(3) That such act was done with the intention of causing death[5]; or

that it was done with the intention of causing such bodily injury as (*a*) the accused knew to be likely to cause death; or (*b*) was sufficient in the ordinary course of nature to cause death; or

that the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause (*a*) death, or (*b*) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

The mere fact that the bodily injury caused resulted in death in the ordinary course of nature, does not necessarily mean that the accused intended to cause such bodily injury[6]. There must always be a finding that the act which caused the death was done with the intention either of causing death or of causing bodily

[1] Per Hosking, J. C., in *Maung U*, (1894) P. J. L. B. 112, 114. See to the same effect *Mangrey*, O. S. C. 210.

[2] *Chit Tha*, (1918) 9 L. B. R. 165; *Nga Pyan*, (1902) 1 L. B. R. 359, dissented from. The latter case was also not followed in *Nga Tha Kin*, (1911) 1 U. B. R. 87.

[3] *Chattar Singh*, (1878) 2 All. 33.

[4] *Rajani Kanto Koer*, (1903) 8 C. W. N. 22.

[5] *Ananda Bhau* (1905) 7 Bom. L. R. 985.

[6] *Hla Tun*, (1898) P. J. L. B. 452.

injury sufficient in the ordinary course of nature to cause death. A finding of inflicting an injury that was merely likely to cause death would not of necessity amount to murder[1]. The intention or knowledge with which the act which caused death was committed is not constructive or a presumption of law, but a matter of fact to be judged of in each case, and proof of collateral facts to explain the motives and designs of the accused is admissible[2].

Proof or motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death[3]. Where the fact of murder has been clearly established, it is by no means incumbent on the prosecution to show what particular motive actuated the criminal's mind and induced him to commit the particular crime[4]. Where, however, the prosecution puts forward a substantive case as to the motive for the crime, the evidence [illegible]

evidence of intention other than what is to be inferred from the accused's act, it is necessary to consider whether the accused must have known, when committing the act, that—

(a) it might possibly, but was unlikely to cause death, or injury sufficient in the ordinary course of nature to cause death,

(b) it was likely to cause death or injury sufficient in the ordinary course of nature to cause death,

(c) it probably would cause death or injury sufficient in the ordinary course of nature to cause death [illegible]

Onus.—The prosecution must prove the circumstances which ordinarily constitute the offence of murder, and the accused, the circumstances, if any, of exceptions which take the case out of that category[8]. If a man takes away the life of another, the onus is on him to show circumstances which justify his doing so[9]. The onus of proving grave and sudden provocation such as would reduce the offence of murder to one of culpable homicide not amounting to murder is on the accused[10].

A trustworthy dying declaration corroborated by surrounding circumstances is sufficient to support a conviction for murder[11]. No reliance can be placed on a dying declaration made at a time when the deceased must have come to know that the accused had been already named as the actual assailant[12].

The accused on his trial is merely on the defensive and owes no duty to any one but himself. He cannot be convicted because he has not tried to explain to the Court how a death has occurred or by whose means[13]. Where a Sessions Judge

1 *Ipalu*, (1923) 1 Ran. 285.

2 See ill. (a) to s. 6, ills. (b) and (c) to s. 7, ill. (a) to s. 8, and ill. (o) to s. 14 of the Indian Evidence Act.

3 *Jauhund Mundle*, (1867) 7 W. R. (Cr.) 60.

4 *Lakshman Narayan*, (Criminal Appeal No. 256 of 1912, decided on July 22, 1912, by Chandavarkar and Batchelor, JJ. (Unrep. Bom.), *Mohna*, (1924) 7 L. L. J. 59.

5 *Nishi Kanta Banikya*, (1924) 41 C. L. J. 35.

6 *Pohla*, (1925) 7 L. L. J. 442, 26 P. L. R. 791.

7 *Shwe Hla U*, (1903) 10 Burma L. R. 29, *Nga Nu Ban*, (1906) 13 Burma L. R. 199.

8 *Sheikh Choollye*, (1865) 4 W. R. (Cr.) 35. [illegible]

1909. [illegible]

12 [illegible], (192?) 27 P. L. R. 632, 8 L. L. J. 419.

13 [illegible], (1894) Unrep. [illegible]

in a trial on a charge of gun-shot murder against N found that N and another person L were seen immediately after the report of the gun at the scene of occurrence each with a gun in his hand, but he did not find which of them fired the fatal shot, his only finding being that either N or L fired the shot that killed the deceased and there was no finding in the judgment that N and L had a common intention and acted in concert and that the gun was fired in furtherance of their common intention, it was held that the legal inference from those findings must be that neither N or L was guilty of the offence of murder[1].

In a case of murder it is unsafe to rely upon the evidence of witnesses who have resiled from their previous statements. Where the evidence given at the trial did not implicate the accused but the earlier statements recorded under ss. 288 and 164, Criminal Procedure Code, tended to implicate him and the motive alleged was not proved, it was held that the conviction for murder could not be sustained[2].

Circumstantial evidence.—A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime by the accused that the defence theory appears on the face of it impossible or highly improbable. The charge of murder, like any other charge of an offence, can be established by inferences, but when there is extremely little in tl e way of direct evidence it is due to the accused that there should be no exaggeration of minor incidents in the case and that each inference against him should be verified with scrupulous accuracy[3]. Circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, sufficiently high that a prudent man, considering all the facts and realising that the life or liberty of the accused depends upon the decision, feels justified in holding that the accused committed the crime[4]. In a case of murder by opium poisoning the prosecution evidence that the accused put some sugar into the vessel in which milk was given to the deceased and stirred the milk with his finger after putting the sugar into it and the deceased died a few hours afterwards, was held to be not sufficient for convicting the accused particularly when the motive for murder was not strong and the habit of eating opium was common among the class of people to which the deceased belonged[4]. If it is proved that a person was found soon after the murder of another person in possession of property which was on the person of the latter when last seen alive, an inference might be drawn in some circumstances that he obtained possession of the property by the murder of the deceased; but it is essential to justify the inference that there is satisfactory proof that the property was in fact in the possession of the deceased when last seen alive[6]. Where the wife of the accused met her death by an unnatural cause, for instance, breaking of her several ribs, the husband was held to be not guilty of murdering her simply on suppositions, as there was nothing very strong connecting him with causing her death intentionally. The mere fact of his trying, with the help of others, to burn the body secretly or taking it in a bundle instead of, as usual, on a bed or litter though suspicious was considered by the Court to be not sufficient evidence of his guilt. An effort to dispose of the body of a dead person in an unusual way is sometimes due to fright of a weak-minded person which can be based on several grounds. But no person can be convicted of an offence on pure circumstantial evidence so long as it is com-

1 *Nibaran Chandra Roy*, (1907) 11 C. W. N. 1085.

2 *Ayyamperumal Pillai*, [1925] M. W. N. 319.

3 *Bhagwan Kaur*, (1911) P. W. R. No. 16 of 1911; *Ahmed*, (1912) P. W. R. No. 23 of 1913. See *Raghunandan Koeri*, (1920) 1 P. L. T. 684; *Majhi*, (1924) 7 L. L. J. 48; *Alla Rakha*, (1927) 29 P. L. R. 227.

4 *Dina*, (1928) 29 Cr. L. J. 640.

5 *Kala Singh*, (1911) P. W. R. No. 25 of 1911, P. L. R. No. 241 of 1911.

6 *Movila Kurmiah*, [1913] M. W. N. 145; *Chiareddi Munayya*, [1911] 2 M. W. N. 478, 21 M. L. J. 1071.

patible with his innocence[1] A conviction of murder cannot be sustained where the only circumstantial evidence against the accused was that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel, carried towards a canal in which her body was afterwards found completely dismembered specially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime[2] Where unexplained possession of stolen property belonging to a deceased person is the only circumstance appearing in the evidence against an accused charged with murder and theft he cannot be convicted of murder unless it is satisfactorily proved that possession of property could not have been transferred from the deceased to the accused except by the former being murdered[3]

Demeanour —It is not safe to base a conviction of culpable homicide only on the evidence of accused s demeanour[4]

Confession —If A and B are jointly tried for the murder of C a confession of A is admissible against B[5] If A is accused of killing C any statement made by C before his death as to the cause of it is receivable in evidence[6]

Discovery of the body of the person murdered not absolutely necessary — Lord Hale laid down I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead [7] This is a rule of caution and not of law If the circumstantial evidence is very strong a conviction could be made[8]

The term *corpus delicti* is an invention of the jurists of the middle ages and was used by them to denote the whole of the facts which constituted the crime of killing when the body of the killed had been found A mixture of German and Roman views led to the proposition (which has found its way into English penal law) that the proof of the aggregate of facts constituting the offence failed *when the body was not found The expression was then extended to other offences,* and was used to denote that the qualities necessary to bring a fact within the operation of a rule of criminal law had been shown to attach to that fact The jurists of the middle ages however, never conceived the dead body in murder, or the object stolen in theft to be that corpus The expression itself has many vices, but in the sense in which its authors used it is at least intelligible[9]

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of murder To recognize any such condition precedent as being absolutely necessary to conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever enough to make away with or destroy the bodies of their victims Such a principle once admitted would in some instances render the administration of justice impossible[10] *But when the body of the person said* to have been murdered is not forthcoming the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted[11] The absence of dead body makes the onus upon the prosecution much heavier than in ordinary cases[12] Where the circumstances are such as to make it morally certain that a crime has been committed the inference that it was so committed is as safe as any other such inference[13] But a Judge exercises a proper discretion

[1] *Lachhman Singh* (1910) P W R No 11 of 1911
[2] *Chhaju Singh* (1914) P L R No 2?1 of 1914
[3] *Sayamu ... Palaya ...* (192?) 30 Mad 2?4
[4] *Pilal Ghani* (1923) 27 P L R 27
[5] Ill (a) to s 30 Indian Evidence Act.
[6] Ill (a) to s 32 ibid
[7] 2 Hale P C 290
[8] *Hindmarsh* (1792) 2 Leach 5?9 *Cheverton* (1862) 2 F & F 833
[9] 7 M H C. App 19
[10] Per Straight J, in *Bhagirath* (188?) 3 ... N 112 ... 449 ... (1886 ... 8??

in not passing a sentence of death in a case in which the dead body has not been found[1]. Where the dead body does not appear and the factum of death is established by nothing but a retracted confession, sentence of transportation may be awarded instead of the heavier sentence[2]. The Chief Court of Oudh has held that where the Court is convinced that the man was dead, death sentence may be passed even if the body has not been found. The question of sentence should be determined upon the gravity of the offence quite irrespective to the circumstance whether the body has or has not been discovered[3].

If the accused confess in the most circumstantial manner to having committed a murder, the finding of the body is not absolutely essential to a conviction[4]. The Bombay High Court in a case held the accused guilty of attempt to murder where the body was not found but the accused had admitted that he had thrown a girl of less than two years of age into a canal, where the water was deep, and swollen by the monsoon[5]. Before a conviction of murder can be obtained, the Court must be satisfied that the person alleged to have been murdered is actually dead. A man was brutally beaten with *lathis* into unconsciousness by the accused who, subsequently, dragged him along the ground up to a certain river, leaving traces of blood both on the fields and on the railway line. The man had never been seen since. It was held that the conclusion that he was dead could not be arrived at though it was exceedingly unlikely that he was alive. In the circumstances the accused were not convicted of murder under s. 302 but of an attempt to murder under this section[6].

In a charge of child murder, the only evidence was the confession of the accused, and no dead body of the child was found. The jury acquitted the accused of murder, and found her guilty of concealment of birth. It was held that there was no sufficient evidence of a separate existence of the child to convict of murder, but sufficient to convict for concealment of birth, although no dead body had been found[7].

Bombay Circular.—*Police-officer conducting the inquiry is a necessary witness.*—In murder cases the constable or other person, who takes the corpse to the medical officer for *post-mortem* examination, should always be sent to the Sessions Court as a witness[8]. In all important criminal cases, and especially in cases of murder and dacoity, it is desirable that the police-officer by whom the investigation was conducted should be in readiness to be examined, if necessary, as witness in regard to the circumstances of the investigation. The police-officer should bring with him his diary of the case and also the memorandum of the statements of the witnesses taken down by him under s. 161 of the Code of Criminal Procedure[9].

When death or grievous hurt has been caused by a blow from a stick or other weapon, the weight and dimensions of the weapon should be stated in the Sessions Court proceedings, with such particularity as may enable the High Court (which has no opportunity of seeing it) to form an opinion as to the character of the weapon and the intention with which it was probably used[10].

The Lahore Rule.—In all cases of homicide, where the body is found, the identity of the body with the person said to be deceased must be fully established before the Magistrate trying or inquiring into the case.

In such cases, where there has been a *post-mortem* examination, evidence must be recorded by the Magistrate to prove the custody of the body of the

1 *Budduruddeen*, (1869) 11 W. R. (Cr.) 20.
2 *Raggha*, (1925) 23 A. L. J. 821.
3 *Ram Nath*, (1926) 1 Luck. 327, 3 O. W. N. 204.
4 *Pella Gazi*, (1865) 4 W. R. (Cr.) 19.
5 *Kashna*, (1894) Cr. R. No. 7 of 1894. Unrep. Cr. C. 687.
6 *Bandhu*, (1924) 22 A. L. J. 340, explained in *Ram Nath*, (1926) 1 Luck. 327, 3 O. W. N. 204.
7 *Maud Kersey*, (1908) 21 Cox 690.
8 B. H. C. Cr. C., Ch. V, s. 78, p. 53.
9 *Ibid*, s. 81, p. 54.
10 See B. H. C. Cr. C., Ch. IV, s. 65, p. 46.

deceased after death, and its delivery for the purpose of *post mortem* examination to the Medical Officer[1]

Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Where culpable homicide has been committed, prima facie, the principal issue is whether the culpable homicide does or does not amount to murder In all ordinary cases, the issue ought to be tried, and ought not to be prejudged by any authority less than the authority of a Court of Session[2]

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why a sentence of death was not passed[3]

If the case falls under one of the exceptions to s 300 and the Judge convicts the accused on the charge of culpable homicide not amounting to murder, he should record under which of the exceptions the case falls[4]

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder the accused should be convicted of the lesser offence[5]

Direction as to commitment—Calcutta Circular—In cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge and convict him of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder, or culpable homicide not amounting to murder[6]

Chemico-legal and post-mortem examinations—See Chapter X of the Madras High Court Rules of Criminal Practice, c 8 of the Lahore Rules vol 2, pp 55 70, s 105 of the Oudh Criminal Digest and s 218 of the Upper Burma Court Manual

Poisoning—Judges who try cases of murder by poisoning should invariably put beyond the possibility of doubt the identification of every single thing that is suspected to contain any poison The evidence should be complete as to the history of such articles and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction, and there should be no possibility of any question being raised as to the identity of any such article[7] Where the accused was proved to have put some powder in the food, which was found by the Chemical Examiner to contain poison but there was no statement or evidence of the quantity of poison found in the food, or of the probable effect on any one who might have eaten it, it was held that the accused could not be held, under the circumstances, to have intended to cause anything more than hurt and could only be convicted of attempt to commit an offence under s 328[8] Before a person can be convicted of murder by poisoning, it is essential to prove that the death of the deceased was caused by poison and that the poison was administered to him by the accused Where the cause of death cannot be ascertained with certainty, a conviction for murder by poisoning cannot be sustained[9]

Pleader for defence—See Bombay High Court Criminal Circular Orders, s 71, as regards the orders issued for the appointment of pleaders for the defence in murder cases[10]

1 L. H C. R & O, Vol II Ch VIII rule 13 pp 55 57

2 *Subbappa Channappa* (1912) 15 Bom L. R 303 2 Bom Cr C. 54, *Naba* (1911) P W R No 12 of 1911

3 Criminal Procedure Code s 367 (5)

4 *Kalika Mater* (1866) 1 Agra 3

5 *Nga Lo Aung* (1893) S. J L. B 439

6 C. H. C R & O Vol I, c. i s 45 p 15. See also Weir (3rd Edn) 157

7 *Shridhar Nana* (1905) 7 Bom L. R. 640

8 *Mi Pu*, (1909) 5 L. B R 79

9 *Gurdern*, (1922) 26 Cr L. J 593

10 See also *Waruder Hari Chapekar*, (1899) 1 Bom L. R 856

Plea of guilty.—'Murder' is a technical word and unless it is explained as directed by s. 300, the plea of guilty should not be accepted. The nature of the offence should be properly explained to the accused[1]. In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused[2]. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence will be a sentence of death[3]. Before such a plea can be accepted the record should clearly shew that the person who is charged understands and admits such facts as would bring his offence within the definition of murder[4].

If the accused in answer to a charge of murder states that he committed the offence but alleges provocation, such a statement does not amount to a plea of guilty on the charge. He must be put on his trial in order to ascertain whether the provocation was grave and sudden enough to prevent the offence from amounting to murder[5].

Charge to the jury in case of provocation.—In charging the jury on the point of provocation in a case of culpable homicide a Judge should tell the jury that, to bring the case within the exception, the accused must have been deprived of the power of self-control by grave and sudden provocation, that there ought to have been sufficient cause for such loss of self-control, and that the provocation was not voluntarily provoked by the accused as an excuse for doing harm[6].

It is the duty of the Judge to explain the distinctions between murder and culpable homicide, and the jury as judges of facts have to decide the issue about sufficient provocation[7].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did commit murder by intentionally (*or* knowingly) causing the death of (*specify the name of the deceased*), and thereby committed an offence punishable under s. 302 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

The intent or knowledge necessary to constitute murder should be set out in the charge[8]. The charge should follow the language of s. 300[9].

Punishment.—"The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so"[10]. If the presiding Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed, that is to say, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstance[11]. Whilst bearing in mind that the primary responsibility for the sentence is his, he should not lose sight of the fact that, should he pass sentence of death, the matter will further be considered by the High Court before the sentence is confirmed. Where a sentence for transportation for life has been passed, there are manifest objections to enhancing it even when a sentence of death ought to have been passed. There is no such objection to commuting a sentence of death to one of transportation for life, and such commutation should not be considered as any reflection on the way in which

1 *Aiyavu*, (1885) 9 Mad. 61.
2 *Bhadu*, (1896) 19 All. 119.
3 *Chinia Bhika Koli*, (1906) 8 Bom. L. R. 240; *Laxmya Shiddappa*, (1917) 19 Bom. L. R. 356, 4 Bom. Cr. C. 85.
4 *Nga Han*, (1919) 3 U. B. R. 137.
5 *Sakharam Ramji*, (1890) 14 Bom. 564; *Netai Luskar*, (1885) 11 Cal. 410.
6 *Gunesh Luskur*, (1868) 9 W. R. (Cr.) 72.
7 *Dadubhai*, (1895) Unrep. Cr. C. 766, Cr. R. No. 30 of 1895.
8 Per Hosking, J. C., in *Nga Nge*, (1897) P. J. L. B. 328.
9 *Sheo Shankar*, (1925) 2 O. W. N. 862.
10 *Tha Sin*, (1902) 1 L. B. R. 216, F.B.
11 *Shwe Hla U*, (1922) 11 L. B. R. 323.

the Sessions Judge has exercised the discretion given him by law[1] If the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law[2] In passing sentence on an accused person convicted of the offence of murder, regard should be had to the circumstances of the case Where the accused is convicted of murder only by reason of this case coming under cl (4) of s 300, a sentence of death is uncalled for[3]

The mere absence of premeditation may or may not form in every case of murder a sufficient ground for imposing the lesser penalty[4] Where murder, even if not premeditated, is carried out with deliberate and persistent ferocity, the only proper sentence to be passed in such a case is one of death[5]

An accused person is entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction[6]

Where the provocation caused to the accused is very grave though not sudden the Court is justified in not inflicting sentence of death and recommending the case to the Government for reduction in sentence[7]

Although s 86 attributes to a drunken man the knowledge of a sober man when judging of his action it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law[8] *Pal Singh's* case has been distinguished in a subsequent case in which it is said that in the former the accused had no motive to cause the death of his victim and that the attack was a sudden one Where, however, the accused primed themselves with drink in order to wreak vengeance upon their enemy and beat him mercilessly, the penalty of death was inflicted[9] Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation[10]

Youth alone in every case is not such an extenuating circumstance as would justify the imposition of the lesser penalty[11] But where there is the additional circumstance of want of motive for the crime and the probability of the accused being merely a tool in the hands of the third persons the lesser penalty may be inflicted[12] The tender age of the accused may, by itself, be a sufficient reason for awarding the sentence of transportation for life[13] But in the case of a ruthless and brutal murder tender age is not a sufficient reason[14]

Under the several Children Acts, no child under the age of fourteen years shall be sentenced to death or transportation[15]

A person did not inflict any injury on the deceased and it appeared that he was acting under the influence of his brother when he accompanied the latter to the place where the offence was committed It was held that under those circumstances the extreme penalty of law should not be exacted in his case[16]

1 *Ma Shwe Yi*, (1923) 1 Ran 731

2 *Public Prosecutor v Paramandi*, (1921) 44 Mad 443

3 [illegible]

8 *Pal Singh*, (1917) P W R No. 35 of 1917, *Tincowri Dhopi*, (1922) 27 C W N 290 39 C L J 34

9 *Sheru*, (1923) 7 Lah 50

10 *Waryam Singh*, (1926) 7 Lah 141

11 *Nga Ba Thin* (1922) 1 B L J 70, *Kachria* (1921) 18 N L R 101, *Ismail*, (1928) 29 Cr L J 510

12 *Harnamun*, (1928) 29 Cr L J 682

13 *Madho*, (1926) 27 Cr L J 955, *Kachria*, [illegible]

The usual practice in the Punjab is to avoid the imposition of fines where death sentences has been given[1].

Where the facts proved established that the accused was not actuated by any 'baser motive', but he committed the offence of murder in the honest, though unfounded, belief that by so doing he was saving the life of, and alleviating the sufferings of, others, the sentence of transportation, instead of a death sentence, was held to be the proper sentence[2].

As to the punishment in the Frontier districts, see the Frontier Crimes Regulation[3], and as to Burma, see the Burma Laws Act[4].

Sex of the accused.—The sex of the offender ought not to be taken into account in passing sentence, unless there are extenuating circumstances. Women who commit cold blooded murder are generally very hard-hearted, more cruel and more daring than even males; and anybody who is acquainted with the habits, traditions and antecedents of women who commit this class of offence must be satisfied that the sentence of death is by no means a harsh sentence to pass on such women. Cases of this kind stand upon a footing different from the cases where women are led into killing their children to cover their own shame because of the cruelty of social customs and laws which their society enforces, with relentless rigour. Where, therefore, a barren woman killed another's child to get children, the Court passed a sentence of death[5]. Comparative lenity to women is a commonly accepted rule of practice though not of law, but in dealing with an atrocious crime the mere sex of the criminal should not bar the imposition of a sentence which would be considered appropriate in the case of a man[6]. The Court sometimes takes into consideration the age of the accused when passing sentence. Where a young girl of fifteen years killed her step-son because her husband was ill-treating her, the Court sentenced her to transportation for life[7]. Where a woman murders her newly born illegitimate child there are mitigating circumstances sufficient to reduce the appropriate penalty of death very much below a sentence of transportation for life[8].

Punishment for murder by life convict.

303. Whoever, being under sentence of transportation for life[1], commits murder, shall be punished with death.

COMMENT.

This section makes capital sentence compulsory in the case of a convict who commits murder while undergoing a sentence of transportation. Thus, where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him according to this section is that of death[9].

1. 'Being under sentence of transportation for life'.—These words indicate that the sentence of transportation must have been passed on the accused. It is immaterial whether he was already transported or not.

[1] *Chuha*, (1913) P. R. No. 18 of 1913.
[2] *Mato Ho*, (1920) 1 P. L. T. 282.
[3] Reg. III of 1901, ss. 11 (3) (*d*) and 12 (2).
[4] Burma Act XIII of 1898, s. 4 (3) (*b*) and Sch. II.
[5] Per Chandavarkar, J., in *Umi kom Jayaji*, Confirmation Cases Nos. 112 and 119 of 1911, decided on March 23, 1911, by Chandavarkar and Heaton, JJ., (Unrep. Bom.); *Ma Shwe Yi*, (1923) 1 Ran. 751.
[6] *Rasammal*, (1914) 16 Cr. L. J. 20.
[7] *Daulan*, (1924) 26 P. L. R. 550.
[8] *Dhania Kunbi*, (1923) 25 Cr. L. J. 63.
[9] *Doorjo Dhun Shamonto*, (1873) 19 W. R. (Cr.) 45.

304. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ,

Punishment for culpable homicide not amounting to murder

or with imprisonment of either description for a term which may extend to ten years or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death

COMMENT

This section "creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted, where, an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the *Exceptions* to s 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but intention to cause death or bodily injury likely to cause death is absent"[1] If the act of the accused falls within either of the clauses 1, 2 and 3 of s 300 but is covered by any of the five exceptions, it will be punishable under the first part If the act comes under cl 4 of s 300 but is covered by any of the exceptions it will be punishable under the second part[2]

Where the finding of the Sessions Judge was that "the accused must have known that he was likely to cause death" and the conviction was under s 302 for an offence falling under s 300 (4), it was held that, on the Court's finding, the accused was guilty of an offence under the second part of this section, and not under s 302[3]

Applicabl [illegible] apply to a case under the second part of [illegible] offence under the second part there mus [illegible] uch injury as the offender knew was likely [illegible] ommon intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may have the common intention to do that act[4].

Whipping —As to whipping in Upper Burma for this offence, see the Burma Laws Act[5], s 4 (*b*) and Sch II

Council of elders.—See the Punjab Frontier Crimes Regulation, 1901[6], as to enquiry by a council of elders in a Punjab Frontier District See also the Frontier Crimes Regulation[7], and the Criminal Tribes Act[8]

[1] Per Straight, J, in *Idu Beg* (1881) 3 All 776 778 *Attra* (1891) P R No 9 of 1891, *Masti*, (1910) P L. R. No 87 of 1911, *Lehna Singh*, (1927) 9 L. L. J 305 *Sunder Singh* (1928) 11 L. L. J 52

[2] *Barkatulla*, (1887) P R No 32 of 1887

[3] *Nga Po Saw*, (1923) 2 B L. J 99

[4] *Adam Ali*, (1920) 31 C. W N 314, 45 C L. J 131

[5] Act XIII of 1898

[6] Reg III of 1901, s 12

[7] *Ibid* s 6.

[8] Act II of 1897, s 6

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That such death was caused by the act of the accused.

(3) That the accused intended by such act to cause death; or

That he intended by such act to cause such bodily injury as was likely to cause death; or

that he knew that such act of his would be likely to cause death.

"The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed.

"The existence of a particular evil motive such as hatred, avarice, jealousy, etc., is not necessary. It is no part of the definition of culpable homicide that the act which causes death should be a malicious act. Malice is not made a necessary ingredient. Whatever may be the motive which incites the action, and whether or not any motive whatsoever be discoverable, the question for investigation is this:—Did the accused person intend to cause death, or a bodily injury likely to end in death: or did he know that it was a probable result of his act? If such was his purpose and design, or such his knowledge,—and none of the General Exceptions of this Code are applicable,—the act is an offence within this definition, although there is no apparent motive for it. If this intention or knowledge is clearly shewn, it is needless to enquire into the motives. It must not, however, be forgotten that under certain circumstances the existence of a motive may become an important element in a chain of presumptive evidence, as tending to shew the intention of the accused person.

"It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observation and experience enables us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally—and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion"[1].

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two will be convicted under this section but both of them can be convicted of an offence under s. 325[2]. But where two or more persons band themselves together for the express purpose of taking a man's life and are found guilty of murder the Court is not justified in refraining from passing a sentence of death, which would otherwise be proper, merely on the ground that it cannot find definitely which of the accused delivered the blow which is to be regarded as fatal[3]. It was found that three appellants came determined to take possession of the *taur* armed with clubs and in the course of the fight one of them who was armed with an iron shod *lathi*, inflicted a fatal injury on the head of the deceased and fractured his skull. It was held, under the circumstances, that the assailant who caused the fatal injury was rightly convicted under the second part of this section and his companions were rightly held guilty under s. 325, as they certainly knew that grievous hurt

1 M. & M. 230, 231.

2 *Agra*, (1914) P. R. No. 37 of 1914, P. W. R. (Cr.) No. 69 of 1914, P. L. R. No. 219 of 1915; *Jhandu*, (1924) 6 L. L. J. 268; *Datta Ram*, (1924) 6 L. L. J. 317; *Dalip Singh*, (1924) 7 L. L. J. 44.

3 *Pedda Tirumaligadu*, (1928) 52 Mad. 147; *Parshadi*, [1929] A. L. J. 244.

was likely to be inflicted and came prepared to inflict it in furtherance of the common object[1]

Procedure.—Cognizbale—Warrant—Not bailable—Not compoundable—Triable by Court of Session

... they may ... mention in ... e homicide was held not to amount to murder

(b) Sessions Judges shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death but without any intention to cause death, or to cause such bodily injury as was likely to cause death And, in cases tried by a jury, they should be careful to obtain a specific verdict on these points[2]

Patna Circ... of culpable homic... remarks on the tri... not to amount to murder.

(b) Sessions Judges shall invariably record their opinion whether the act by which the death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death but without any intention to cause death, or to cause such bodily injury as was likely to cause death

And, in case tried by jury, they should be careful to obtain a specific verdict on these points[3]

The Central Provinces Circular—In view of the distinctive penal provisions contained in s 304 of the Penal Cod... specially empowered will, in all cases in which ... culpable homicide not amounting to murder, ... ether the act by which the death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death or with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death[4].

Venue—See ills (a) and (b) to s 179, Criminal Procedure Code

Committal—Where death has resulted from a violent attack, the Magistrate must commit the accused to the Court of Session on a charge of culpable homicide not amounting to murder[5]

Charge to the jury.—In his charge to the jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in this section, and direct them to find specially under which, if either, the accused is guilty[6] Where the Judge omitted to require the jury to do this, the High Court held that the conviction was for the lighter description of the offence[7] In a trial on a ...

amounting to murder The general conduct of the accused at the time of commit-

1 *Hoshnak Singh*, (1928) 29 P L R. 265, 9 L. L J 529

2 C. H C R & O Vol I c I, s 74 p 28

3 Pat. H. C. Cr C. para 42 (a) (b) p 18, 19

4 C. P Cr C. (1929) Part I C. No I, p. 1

5 *Gopinath Shaha*, (1877) 1 C. L. R. 141, (1881) 1 Weir 283.

6 *Kalachurn Dass*, (1871) 15 W R (Cr) 17, 6 Beng L. R App 86, *Ladhya* (1890) Cr P No. 62 of 1890 Unrep Cr C. 530, *Posha Hari* (1895) Cr No. 4 of 1895, Unrep. Cr C. 735.

7 *Ameer Khan* (1869) 12 W R (Cr) 35.

ting the act, the nature of the weapon used, the number and nature of the wounds inflicted are all considerations which should guide the jury in arriving at the intention of the accused[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed culpable homicide not amounting to murder, causing the death of——, and thereby committed an offence punishable under s. 304 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[2].

Punishment where death is caused from provocation.—The Bombay High Court has observed that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour, and death caused under such circumstances must be visited with a very light sentence. It, therefore, passed a sentence of six months' rigorous imprisonment where death was the result of provocation of this sort[3]. Similarly, the former Chief Court of the Punjab had sentenced the accused to one year's imprisonment where he caught the deceased in the act of adultery with his married sister and struck him one blow on the head with a stick which killed him by fracturing his skull[4].

The Penal Code of some countries provides specially for the reduction or even the entire remission of punishment for the slaying of an adulterer taken in the act. The Indian Penal Code, like that of most other countries, makes adultery punishable as a crime. However the matter may be regarded from a moral point of view, the law forbids the husband to take vengeance with his own hands, and, if he chooses to avenge his injury himself, he does so at his peril. At the same time the amount of punishment to be imposed is discretionary, so that while it is made sufficiently severe to deter the injured husband from resort to excess in violence, it may not be made so severe as to encourage adulterers with the hope of immunity from immediate chastisement[5].

Where the accused was found to have murdered his wife under a mistaken impression that she was unchaste, the High Court set aside the punishment of death passed upon him and sentenced him to transportation for life[6]. But a mere suspicion of a wife's conduct is no extenuation of a deliberate act of murder[7]. Where the act is deliberate to get rid of a wife[8], or where the husband leaves his wife for several months and subjects her to temptations and kills her lover[9] the extreme penalty must be inflicted. Where there was a violent altercation between a husband and wife and the husband threw a stone which killed the wife, the Court altered the sentence of death to one of transportation for life[10].

In a quarrel between the accused's wife and his brother's wife, the latter abused the accused's daughters, whereupon the accused hit her a single violent blow with a stick which he picked up there and then. The woman died of her injury the following day. There was no feeling of enmity between the accused and the deceased. It was held that the quarrel being unpremeditated and the blow having been struck in the heat of passion, a severe sentence was not called for, and that a sentence of three years' rigorous imprisonment would meet the ends of justice[11].

Punishment where right of defence exceeded.—Where, in an affray respecting land, one party were the aggressors, and the other side (had the affair not ended

1 *Kya Nyan*, (1913) 8 L. B. R. 125.
2 Criminal Procedure Code, Sch. V, xxviii (6).
3 *Asha Gopal*, (1897) Unrep. Cr. C. 932, Cr. R. No. 42 of 1897.
4 *Fazal Dad*, (1904) P. R. No. 4 of 1904.
5 *Nga Lun Mya*, (1894) 1 U. B. R. (1892-1896) 213.
6 *Dnia Bandhu Moitra*, (1903) 8 C. W. N. 218.
7 *Dasan Alias Devan*, [1929] M. W. N. 269, 30 L. W. 229.
8 *Cheva Indramma*, [1929] M. W. N. 270.
9 *Pateshwari*, (1928) 5 O. W. N. 160.
10 *Souaroo*, (1866) P. R. No. 105 of 1866.
11 *Karam Ilahi*, (1927) 29 Cr. L. J. 33.

fatally) would have been in the legal exercise of the right of defence of property and would have been entitled to the benefit of s. 104, it was held that one year's rigorous imprisonment was sufficient[1].

Causing death by negligence

304A. Whoever causes the death of any person by doing any rash or negligent act[1] not amounting to culpable homicide[2] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with homicide by negligence

Object.—The provision for the punishment of In the draft Code there was accident it had been omitted from the Code when it was passed into law The present section inserted by Act XXVII of 1870, s 12, supplied the omission

Scope.—The provisions of this section seems to apply to cases where there is no intention to cause death and no knowledge that the act done in all probability would cause death[2]. It must be read along with ss 336, 337 and 338

This section does not apply to a case in which there has been the voluntary commission of an offence against the person If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to de likely by such the result is nc the wilful offence does not take the character of rashness, because its consequences have been unfortunate Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character[3]. Where the act is in its nature criminal, death has arisen, not from rom some result supervening

1. 'Rash or negligent act'.—A rash act is primarily an overhasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it

[1] *Shunker Sing* (1864) 1 Weir 34, *Fuzza Meeah*, (1866) 6 W R. (Cr) 89

3 All 597; *Idu Beg* (1881) 3 All 776, *Saifulla*, (1882) P R. No 15 of 1882

[4] *Damodaran*, (1888) 12 Mad. 56, *Mehr Ilahi* (1911) P W R. (Cr) No. 26 of 1911

[5] *Heera Jeela* (1901) 3 Bom L. R. 394

[6] *Nga Myat Thin*, (1898) P J L. B 426

[7] Per Alderson, B., in *Blyth* v *Birmingham Waterworks Co*, (1856) 11 Ex 781, 784

"Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted"[1].

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that because, in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception... It is clear, however, that if the words 'not amounting to culpable homicide' are a part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death"[2].

"Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished... Suppose a man performed a surgical operation, whether from losing his head, or from forgetfulness, or from some other reason, omitted to do something he ought to have done, or did something he ought not to have done, in such a case there would be negligence. But if there was only the kind of forgetfulness which is common to everybody, or if there was slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to proceed against a man criminally in respect of such injury. But if a surgeon was engaged in attending a woman during her confinement, and went to the engagement drunk, and through his drunkenness neglected his duty, and the woman's life was in consequence sacrificed, there would be culpable negligence of a grave kind. It is not given to everyone to be a skilful surgeon, but it is given to everyone to keep sober when such a duty has to be performed"[3].

To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part. It is not every little trip or mistake that will make him so liable[4]. The distinction between the negligence which is sufficient ground for a civil action and the higher degree which is necessary in criminal proceedings is sharply insisted on in several cases[5]. The prosecution must satisfactorily prove that negligence or incompetence of the accused

1 Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 779, 780; *Smith*, (1925) 53 Cal. 333.

2 *Nidamarti Nagasbhushanam*, (1872) 7 M. H. C. 119, 120.

3 Per Stephen, J., in *Doherty*, (1887) 16 Cox 306, 309.

4 Per Lush, J., in *Finney*, (1874) 12 Cox 625.

5 *Noakes*, (1866) 4 F. & F. 920.

went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment[1]

[illegible] 'Death should have been [illegible] have [illegible] other's negligence It must have been the *causa causans*, it is not enough that it may have been the *causa sine qua non*"[2] Where a person using a road was accidentally killed in consequence of it being out of repair through neglect of trustees, appointed for the purpose of repairing the roads, to contract for repairing it, it was held that they were not chargeable with manslaughter[3] If the driver of a carriage be racing with another carriage, and from being unable to pull up his horses in time the first-mentioned carriage is upset, and a person thrown off it and killed, this is manslaughter in the driver of that carriage[4]

2. **'Not amounting to culpable homicide'.**—' Section 304A is directed at offences outside the range of ss 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge enters For the rash or negligent act which is declared to be a crime is one 'not amounting to culpable homicide', and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded Section 304A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description According to English law, offences of this kind would come within the category of manslaughter but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts There may be in the act an absence of intention to kill, to cause such bodily injury as is likely to cause death, or of knowledge that death will be the most probable result, or even of intention to cause grievous hurt, or of knowledge that grievous hurt is likely to be caused But the inference seems irresistible that hurt at the very least must be presumed to have been intended, or to have been known to be likely to be caused If such intention or knowledge is present, it is a misapplication of terms to say that the act itself, which is the real test of the criminality, amounts [illegible] in a verbal [illegible] the result [illegible] e more than an hour died Upon the *post mortem* examination it was found that her "spleen was badly ruptured, almost torn across, death was caused by rupture of the spleen' There were no signs of disease of the spleen though it was a little enlarged The Sessions Judge convicted him under this section, but the High Court altered the conviction to one under s 325 on the ground that the blow was wilfully and consciously given to the deceased by the accused and the consequences that resulted from it could not change a wilful and conscious act into a rash or negligent one and it was found that the accused neither intended to kill nor to cause bodily injury likely to cause death and that he had not the knowledge that death would be the probable result[6]

1 Per [illegible] Bateman (1925) 19 Cr App R 8.
2 Per Jenkins C J in Omkar Rampratap (1902) 4 Bom L R 679 682, Ledger, (1862) 2 F & F 857
3 Thomas Pocock (1851) 5 Cox 172
4 Richard Timmins (1836) 7 C & P 499
5 Per Straight J in Idu Beg (1881) 3 All 776 778 779
6 Idu Beg ibid

Death caused by persons practising surgery or medicine.—Where a person practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter, but if there is no gross negligence it is not[1]. Where a person acting as a medical man, whether licensed or unlicensed, administers to a patient a poisonous medicine without any intent of doing any bodily harm but with an intent to prevent or cure a disease and it kills the patient, he is guilty of an offence under this section[2].

Contributory negligence.—The doctrine of contributory negligence does not apply to criminal liability where the death of a person is caused partly by the negligence of the accused and partly by his own negligence. The doctrine of contributory negligence has no place in an indictment for criminal negligence[3].

If the accused is charged with contributing to the death of the deceased by his negligence, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death[4].

CASES.

Rash or negligent act.—Where a railway official, after being instructed to move some trucks down an incline uncoupled and singly, disobeyed the instruction and lost control over them, and a cooly in trying to stop the trucks fell under the wheels and was killed[5]; where an engine-driver failed to sound his whistle before starting the engine, and the engine having been put in motion caused a boy, who was painting a wagon on the line, injury, which resulted in his death[6]; where the accused while out shooting with the deceased in a jungle separate from him, seeing something move in the jungle but without waiting to see what it was, fired and shot the deceased[7]; where the accused cut out the piles of a person with an ordinary knife and, from the profuse bleeding, the person died[8]; where the accused struck at a man carrying a child and the blow fell on the child and killed it[9]; where the accused received poison from her paramour to administer it to her husband as a charm and administered it with the result that death ensued, but she did not know that the substance given to her was noxious until she had seen its effects[10]; where the accused administered to her husband a deadly poison (arsenious oxide) believing it to be a love potion in order to stimulate his affection for her,

1 *Long*, (1831) 4 C. & P. 383, 423; *Joseph Senior*, (1832) 1 Mood. Cr. C. 346; *Simpson*, (1829) 1 Lewin 172; *Spiller*, (1832) 5 C. & P. 333; *Fergusson*, (1830) 1 Lewin 181; *Joseph Webb*, (1834) 1 M. & Rob. 405. See Roscoe, 14th edn., p. 821, *et seq.*, where all cases on the point are collected.

2 *De Souza*, (1920) 42 All. 272; *Mahla*, (1924) 1 Lah. C. 393.

3 *Woodward*, (1924) 18 S. L. R. 199.

4 Per Pollock, C. B., in *Swindall*, (1846) 2 C. & K. 230, 232, referred to in (1871) 6 M. H. C. App. 31; *Dant*, (1865) 10 Cox 102; *Hutchinson*, (1864) 9 Cox 555; *Jones*, (1869) 11 Cox 358; *Kew*, (1872) 12 Cox 355: *William Walker*, (1824) 1 C. & P. 320; contra, *Birchall*, (1866) 4 F. & F. 1087.

5 *Nand Kishore*, (1884) 6 All. 248.

6 *Francis R. Thompson*, (1894) Cr. R. No. 47 of 1894, Unrep. Cr. C. 721.

7 *Nga Pon Gyi*, (1885) S. J. L. B. 308.

8 *Sukaroo Kobiraj*, (1887) 14 Cal. 566; but see *Baboolun Hijrah*, (1886) 5 W. R. (Cr.) 7 and *Gonesh Dooley*, (1879) 5 Cal. 351.

9 *Budhya*, (1888) Unrep. Cr. C. 398; *Jama*, (1888) P. R. No. 28 of 1888; *Kaku*, (1920) 4 L. L. J. 487. (Sentence of six months' rigorous imprisonment held to be sufficient because the stick thrown at a woman which killed the child was a light one). But in *Sahae Rae*, (1878) 3 Cal. 623, such an act was held to be grievous hurt.

10 *Mussammat Bakhan*, (1887) P. R. No. 60 of 1887; *Kehma*, (1869) P. R. No. 8 of 1869; *Musst. Sultan*, (1884) P. R. No. 35 of 1884. Under similar circumstances the Bombay High Court acquitted the accused of the offence of murder: *Nagawa Bhimappa*, (1902) 4 Bom. L. R. 425; but in this case the question whether the act of the accused did come not under s. 304A was not considered.

and the husband died from the effects of the poison[1] where the accused administered a love potion (found to be aconite) to her husband, mother in law, and brother in law, thinking that it was some charm to procure their love as they were ill treating her because she was carrying on an intrigue with a close neighbour, and her husband and mother in law died[2], where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious, and mixed it with food believing that by doing so she would become rich, but four of the persons who ate the food died[3], where the lessee of a ferry allowed an unsound boat to be used, and in consequence of its unsoundness, the boat sank while crossing the river and some of the persons in it were drowned[4], where the accused being absorbed in an attempt to witness the preparations for a festival drove his cart on one side of the road regardless of the persons standing on that part of the road, and in so doing drove over and killed a child[5], where the accused and the deceased were standing on the parapet of a deep well, and an altercation having arisen between them the accused struck the deceased on the head with a club and the deceased lost his balance, fell into the well and was drowned[6] where the accused sent two boxes containing fireworks to a railway company falsely declaring them to contain iron locks, with the result that in loading one of the boxes exploded killing one cooly injuring another, and damaging the railway wagon in which it was being placed[7], where the accused had sexual intercourse with his child wife with such violence as to rupture the vagina and destroy

[8] and where the
ected to blow his
pposite direction

and knocked down a boy of fourteen years who had just got down from the rear of the trar that
the acts
which
had be t the
accused It having been reported to the accused that three thieves were prowling about, he, with two other men, went out to patrol They saw a man crouching under a tree, and thinking he must be a thief, the accused fired at him, and killed him The man proved to be a cooly It was held that the accused was guilty of a most rash act[10] Where, by the bullet fired by the one or the other of two accused persons who were practising at target shooting at a place near which was a public road which the accused would have noticed if they had used the least circumspection, a man was wounded resulting in his death, it was held that both the accused were guilty of an offence under this section and that in such a case the *one whose bullet struck the deceased and caused death could not be held to be the* only principal offender under it, and the other whose shot did not strike the deceased, his abettor under s 114[11] This case follows an English case the facts of which are similar A B and C went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it B placed a board, which was handed to him by A, in

[1] *Ramava Channappa*, (1915) 17 Bom

who administered to her husband *dhatura* as a love philtre which made him ill was acquitted of the charge under s 328 as it was not administered with a malicious desire of injuring her husband.

[2] *Pika Bewa* (1912) 39 Cal 855

[3] *Jamna* (1903) 31 All. 290

[4] *Bhutan* (1894) 16 All 472.

[5] *Intru Soma* (1880) 1 Weir 327

[6] *Chunni Lal* (1889) P R. No 33 of 1889

[7] *Kamr ud-din* (1905) P R. No 22 of 1905 P L. R No 24 of 1905

[8] *Shahu Mehral* (1917) 11 S. L. R. 76.

156.

[11] *Morgan* (1909) 13 C. W N C L. J. 204

the presence of C, in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy on a tree in a garden near the field, at a spot 393 yards distant from the firing point. A, B and C were all found guilty by the jury of manslaughter. It was held by the Court that A, B and C had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter[1]. Where an Assistant Station Master on duty at a station gave the "line clear" on his own responsibility on a foggy night knowing that another train was standing at a particular point and the train which was allowed to pass came into collision with the standing train, it was held that the granting of "line clear" under the circumstances was in itself a rash and negligent act which rendered him amenable to punishment[2]. An unqualified person who was in charge of a dispensary had to make up a quantity of quinine mixture for cases of fever. He went to a cupboard where non-poisonous medicines were supposed to be kept and took therefrom a bottle with an outside wrapper marked 'poison'. This wrapper he tore off and threw away. The bottle itself was labelled 'strychnine hydrochloride'; but, without regarding this, and apparently because there was a resemblance between this bottle and another in which quinine hydrochloride was kept, he made up the entire contents of the bottle as if it had been quinine. The result was that seven patients died. It was held that he was guilty under this section[3]. The accused, a girl of seventeen, who happened to be carrying her infant daughter tied on her back, having been exasperated at an altercation which she had with her husband, attempted to commit suicide by jumping into a well. She was found alive in the well next day but her child was drowned. The trial Judge convicted her of an attempt to commit suicide and also of the murder of her infant child, under ss. 309 and 302. It was held that the offence which she had committed was not murder, but causing death by negligent omission, i.e., omission to put the child down before jumping into the well[4].

Acts neither rash nor negligent.—Where the accused gave the deceased a push which caused him to fall, and in such fall he broke his toe, and on the fifth day died of tetanus, this section was held not to apply. The High Court remarked that it was simply a case of using criminal force[5]. Where the accused threw his stick at the deceased with such force that it hit the deceased on the head with the point, and made a punctured wound which caused the death of the deceased, it was held that he had not committed an offence under this section, because the injury was intentionally caused to the deceased. He was, therefore, held guilty of causing hurt[6]. Where there was medical evidence to show that milk had been administered to a child in such quantities as to kill it, but there was no evidence to show that the milk was administered by the orders of the mother, or that she knew the quantity that was being administered, it was held that there was no evidence for a conviction under this section[7]. The accused was watching his field one dark night. Hearing a noise in the field he shouted, whereupon a thief ran out of it whom he followed and struck with a stick. The thief fell down, and the accused caught him and took him to a Zemindar's house. The thief became insensible there, and subsequently died from the effects of the blows which the accused had given him. It was held that he could not be convicted of an offence under this section[8].

1 *Salmon*, (1880) 6 Q. B. D. 79.
2 *Tapti Prasad*, (1917) 15 A. L. J. 590.
3 *De Souza*, (1920) 42 All. 272; *Mahla*, (1924) 1 Lah. C. 393.
4 *Supadi Lukadu*, (1925) 27 Bom. L. R. 604, 8 Bom. Cr. C. 46.
5 *Acharjys*, (1877) 1 Mad. 224.
6 *William Keegan*, (1893) Cr. R. No. 38 of 1893, Unrep. Cr. C. 673.
7 *Mussumat Pemkoer*, (1873) 5 N. W. P. 38.
8 *Bhikham*, (1881) 1 A. W. N. 103.

The accused's wife, eight or nine years of age, was brought by her father to his house for the purpose of being left there At night the accused and his wife went inside the house, the fathers of both remaining outside in the verandah After midnight the girl left the house with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water, from which she was rescued by the accused's father, and brought back to the house by the accused The accused, having pulled her into the house, kicked her on the back with his bare foot, from which kick the girl fell down and died The Sessions Court convicted the accused under this section But the High Court set aside the conviction and convicted him of culpable homicide, observing "To kick a girl of tender age with such force as to produce rupture of the ab [illegible] of such a character that no [illegible] causing death"[1] Where t[illegible] ruck him with a piece of stone on his head and back and that person died ten days after receiving the injuries, it was held that the section was not applicable to a case where injuries were inflicted neither rashly nor negligently but intentionally and designedly[2]

Too remote consequences—B, an Assistant Station Master at a station G had, in anticipation of receiving a line clear and caution message, and against rules written out in the prescribed form book a conditional message to the effect that on the arrival at G of a down train then due from a station S, the line would be clear for a certain up train at G to start for S The guard of the latter train thereafter, without the knowledge of B and also against rules, entered the Station Master's room in his absence tore this imperfect certificate from out of the book and without reading it, as he ought to have done, signed and passed it on to the driver, and gave the signal for the train to start, but without taking the permission of the Station Master as the rules required The driver also without examining the certificate, started the train and a collision took place in which several persons including the driver were killed B and the guard were both convicted under this section It was held that B was not liable the consequences were too remote to have been caused by B's writing out the certificate in disobedience of the rule[3] Where the accused, driving a motor-car at night, entered a road which being under repairs was closed to traffic and ran over and killed two coolies who were sleeping on the road with their bodies completely covered up except for their faces, it was held that the accused was not guilty of causing death by a rash and negligent act as it could not be said that he should have looked out for persons making such an abnormal use of the road[4]

Mistake of fact (ghost)—Where a person believing in good faith that the object of his assault was not a human being but a ghost, caused fatal injuries on another which resulted in the death of the latter, it was held that in view of the provisions of s 79 of the Penal Code, the accused was not guilty of an offence under this section Where the accused entertained a belief that a stooping child whom he caught sight of in the early gloaming was a spirit or demon, the child being in a place which the accused and his fellow villagers deemed to be haunted, and acting on this belief caused the death of the child by blows he inflicted before he discovered his mistake, it was held that the accused was guilty under this section[6]

English cases—**Gross negligence**—Where the defendant came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed a woman[7], where a workman threw down a piece of timber crying aloud stand

[1] *Ketabdi Mundul* (1879) 4 Cal 764 7[illegible]
[2] *Idlingippa Shivappa* (1912) 14 Bom L R. 1887 1 Bom Cr C 183
[3] *Shankar Balkrishna* (1904) 32 Cal 73 9 C W N Cl[illegible]
[4] *Smith* (1927) 53 Cal 333
[5] *Baryam Singh*, (192) 28 Cr L J 23
[6] *Hayat*, (1887) P R No 11
[7] *Burton*, 1 Str 4[illegible] [illegible] 510 Rennels,

clear' and was heard by all labourers but one on whom it fell and killed him[1]; where a man turned out a horse known to be vicious on a common across which were public footpaths and he kicked a child who died[2]; where the accused being employed to drive a cart sat in the inside instead of attending at the horse's head and that cart went over a child who was gathering up flowers on the road[3]; where an unskilled practitioner prescribed dangerous medicines of which he was ignorant[4]; where a man pointed a gun at another person without previously examining whether it was loaded or not, and it accidentally went off and killed that person[5]; and where a lad, as a frolic, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the cartman was killed[6], it was held that the accused were guilty of gross negligence.

No gross negligence.—The accused was an attendant at a lunatic asylum. Being in charge of a lunatic, who was bathing, he turned on hot water through mistake into the bath, and thereby scalded him to death. It was found that the lunatic was a man capable of getting out by himself and of understanding what was said to him and that he was told to get out. It was held that he was not guilty of gross negligence[7]. The negligent act which causes death should be that of the party charged. Where it was the duty of the accused to attend a steam-engine but he had stopped it and gone away, and, during his absence, a person came to the spot, and put it in motion and, being unskilled, was not able to stop it again, and a person was killed in consequence of its being in motion, it was held that the death was not the consequence of the accused's act[8]. The negligence of the accused, however gross, will not render him responsible for a death which his diligence would not have averted[9]. The accused was indicted for the manslaughter of a passenger in a train of which he was in charge as guard. The accused had directed the train to be separated on an incline, whereby a portion of the train ran backwards and collided with another train, causing the death of many of the passengers. It was held that in order to convict the accused he must be found guilty of 'gross negligence' or 'reckless negligent conduct' and that mere intellectual defect or mistake of judgment, without wilful disobedience as to a traffic regulation, would not create criminal liability[10].

On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of open air, in breach of an alleged duty, Patterson, J., in his charge to the jury, said: "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter[11]".

Where it was the duty of the accused as ground bailiff of a mine to cause the mine to be properly ventilated by causing air headings to be put up where necessary, and by reason of this omission another person was killed by an explosion of fire damp, it was held that the accused was guilty of manslaughter by negligence[12].

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That the accused caused such death.

1 *Hull*, (1664) Kelyng 40.
2 *David Dant*, (1865) L. &. C. 567.
3 *Knight*, (1828) 1 Lewin 168.
4 *Markuss*, (1864) 4 F. & F. 356.
5 *John Jones*, (1874) 12 Cox 628.
6 *James Sullivan*, (1836) 7 C. & P. 641.
7 *Finney*, (1874) 12 Cox 625.
8 *Hilton*, (1838) 2 Lewin 214.
9 *Dalloway*, (1847) 2 Cox 273.
10 *Elliot*, (1889) 16 Cox 710.
11 *Simon Marriott*, (1838) 8 C. & P. 425, 433.
12 *Haines*, (1847) 2 C. & K. 368.

(3) That such act of the accused was rash or negligent, although it did not amount to culpable homicide

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class

The Central Provinces Circular.—Section 304A of the Penal Code is not to be applied to cases in which there is voluntary commission of an offence against the person Th [illegible]
the judgment [illegible]
7 Madras High [illegible]
in that section —* * * *

It may be added that in cases in which there has been an intention to cause bodily injury, and the offence does not amount to culpable homicide, the person by whom death has been caused should be punished for causing either hurt or grievous hurt, according as his intention and the nature of the injuries inflicted bring the case within the definition of one or the other offence[1]

Direction to jury.—Where an accused was charged with culpable homicide and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by the accused on the body of the deceased, it was held that it was not sufficient, in order to find the accused guilty of a rash act under s 304A, that the jury should be satisfied only of the prevalence of the disease of enlargement of the spleen in the district, and infer therefrom criminal rashness in beating the deceased, but that they should also be satisfied that the accused was aware of the prevalence of such disease in the district, and also aware of the risk to life involved in striking a person afflicted with that disease[2]

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, caused the death of—— by doing a rash or negligent act not amounting to homicide, to wit——, and thereby committed an offence punishable under s 304A of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge

Abetment of suicide of child or insane person

305 If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

Object.—This and the following provisions have been inserted because the ordinary law of abetment is inapplicable They apply when suicide is in fact committed

'Suicide' is the self-destruction by a person

The Law Commissioners observe ' It seems to us that the rule would fall to be applied under these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission of his duty *intentionally* given him the opportunity, or permitted him to obtain the means

[1] C P Cr C. (1929) Part I, No 2 ss 1, 3, p. 3

[2] *Safatulla* (1879) 4 Cal 815

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

COMMENT.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted[1].

The authors of the Code say:—"These clauses appear to us absolutely necessary to the completeness of the Code. We have provided, under the head of bodily hurt, for cases in which hurt is inflicted in an attempt to murder; under the head of assault, for assaults committed in attempting to murder; under the head of criminal trespass, for some criminal trespasses committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not assaults, and which cause no hurt. A, for example, digs a pit in his garden, and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit; but A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z with the intention of cutting his throat.

"Again, A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own; and if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of the food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him, A causes no bodily hurt; yet it is plain that A has been guilty of a crime of a most atrocious description.

"Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim.

"It is to meet cases of this description that clauses 308 and 309 [sections 307 and 308] are intended"[2].

Scope.—The intention or knowledge which is necessary to constitute murder may exist, combined with an act which falls short of the complete commission of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted or prevented from consummating the crime. This and the following section seem to apply to attempts to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, although it does not cause death, is carried to such a length as, at the time of carrying it to that length, the offender considers sufficient to cause death[3].

1 Stephen's Digest of Crim. Law, Art. 49.
2 Note M., pp. 150, 151.
3 M. & M. 274; *Rawal Arab*, (1898) Unrep. Cr. C. 964: *Mangavalli Ranganayakamma*, (1889) 1 Weir 328.

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases be ascertained without any reference at all to actual wounds[1]

If a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself If he did all that he could do, and completed the only remaining proximate act in his power he cannot escape criminal responsibility because the consequences which he expected to ensue were prevented from ensuing[2]

See notes on s 511, *infra* where there is a full discussion as to what constitutes an attempt

1. **'With such intention or knowledge'**—The intention or knowledge must be such as is necessary to constitute murder Without this there can be no attempt to murder

2. **'Under such circumstances'** — It is necessary that there must be an act done under such circumstances that death might be caused if the act took effect The act must be capable of causing death in the natural and ordinary course of things, and if the act complained of is not of that description a prisoner cannot be convicted of an attempt to murder under this section The illustrations given bear out this view [3] The only act which can fall within its purview is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events Where a person struck his wife on her neck with an axe causing an incised wound, it was held that he was guilty of causing hurt by a dangerous weapon (s 321) and not of attempt to murder The Court observed "Although a hatchet is a dangerous weapon a blow with it is not in our opinion, an act ordinarily capable of causing death in the natural and ordinary course of [illegible] with a hatchet is or [illegible] particular nature of [illegible] where the accused's criminal liability must be limited to the act which he in fact did and cannot be extended so as to embrace the consequences of another act which he might have done but did not do [4] Where the acts committed by the accused consisted only in running after the complainant with an axe in his hand and raising it to the shoulder when about four steps from the complainant but before there was time to do anything further in pursuance of his purpose the axe was snatched out of the accused's hand, it was held that the accused was not guilty of an attempt to commit murder as neither of his act could *per se* have caused death, but that he was guilty of an attempt to cause grievous hurt[5]

The Allahabad High Court has held that the words 'under such circumstances indicate that 'the act must be done in such a way and with such ingredients that if it succeeded and death was caused by it the legal result would be murder according to ss 299 and 300[6]

Where the accused pointed an uncapped gun at his superior officer (believing the gun to be capped) with the intention of murdering him but his rifle was pushed up and he was prevented from the pulling the trigger, it was held that he was

[1] *Kyaw Re* (1908) 4 L B R 311 F B overruling *Nga Shwe New*, (1869) S J L B 466

[2] *Niddha* (1891) 14 All 38, *Abdul Rahaman* (1908) 9 C L J 432

[3] Per Couch C J in *Francis Cassidy* (1867) 4 B H C (Cr C) 17 21 *Jiwan Das* (1904) P R No 30 of 1904

[4] *Maria Vithoba Prabhu* (1913) 15 Bom L R 991 993 2 Bom Cr C 159

[5] *Jiwan Das* sup

[6] Per Straight J *Niddha* (1891) 14 All 38, 43.

guilty not under this section but under s. 511. In this case Westropp, J., said that there "may be an attempt under s. 511 which does not come within s. 307"; and "s. 307 was not intended to exhaust all attempts to commit murder which should be punishable under the Code"[1]. But the Allahabad High Court has laid down that s. 511 does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307. In this case the accused pointed a loaded pistol at a person to shoot him and pulled the trigger. The cap exploded but the charge did not go off. He was convicted under this section. It was held that a person was criminally *responsible for an attempt to commit murder* when, with the intention or knowlege requisite to its commission, he had done the last proximate act necessary to constitute the completed offence, and when the completion of the offence was only prevented by some cause independent of his volition. Straight, J., observed: "Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences, which by the Code itself are punishable either with 'transportation or imprisonment'. It cannot properly be said that the offence of *murder is punishable with either of those things*. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word transportation have insertea the word 'death'. But, again, the section goes on and says that, certain things being done, the person who does those acts shall, 'where no express provision is made for the punishment of such attempt', be punished in a particular way. As I have pointed out, by s. 307...there is express provision made in the Code itself for the punishment of an *attempt to murder*. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive and that no Court has any right to resort to the provisions of ss. 299 and 300 read with s. 511 for the purpose of convicting a person of the offence of attempted murder, which, *according to the view of the Court*, does not come within the provision of s. 307"[2]. Mayne, (4th Edn., p. 532) in his Criminal Law, thus criticises these remarks: "Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under s. 303 is only punishable, and in fact can only be punished with death. Cases of *murder therefore* do come within the letter of s. 511. It seems obvious too that those words in s. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned judge's reasoning would not apply to s. 308, which is in *pari materia* with s. 307, and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt, coming under s. 511, which is *specifically provided for elsewhere*, must be dealt with under the express provision. For instance, an attempt to wage war against the King must be dealt with under s. 121. It is also quite clear that any attempt to commit culpable homicide which falls under ss. 307 or 308, must be dealt with under them and not under s. 511. What the Bombay case decided was, that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under s. 511 because it did not come within s. 307. That being so, it fell within the wording of s. 511, as being a case 'where no express provision is made by this Code for the punishment of *such* attempt'. According to Mr. Justice Straight, such a case would *go wholly unpunished*.

[1] *Francis Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17, 24, 25.

[2] *Niddha*, (1891) 14 All. 38, 41.

"The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, viz, trying to discharge an uncapped rifle, supposed to be capped, did not come within s 307 'If he did all that he could do, and completed the only remaining proximate act in his power, I do [illegible] his because his own act, [illegible] full effect, a fact unknown [illegible] prevent the consequences of that act, which he expected to ensue, ensuing'. This is well illustrated by *Ananda Bhau*[1] There the accused intending to kill his victim gave large doses of opium in milk but unknown to him, the intended victim was a confirmed opium eater and thus he escaped serious harm *But it may be submitted that the question* is, not whether the accused would escape criminal responsibility—it was decided that he was liable under s 511,—but whether he would be criminally responsible under the very special words of s 307 If that section only applies where the prisoner has done an act, which, if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that *Cassidy* had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs, that he had levelled it at his officer and pulled the trigger, it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder, but that is not enough The section requires that he should have done the act He intended to discharge his own loaded rifle He presented and tried to discharge a weapon which was as harmless as a broomstick'

The Rangoon High Court has held in a case in which the accused presented a gun at the complainant and pulled the trigger, no report or discharge resulting, that, in the absence of evidence to show that the gun was loaded, the accused [illegible]

[illegible]

or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murde[illegible] would not, unless followed by the other acts [illegible] beginning of the attempt, but would none the [illegible] the accused was proved to have bought cyanide of potassium on December 22, 1909 On January 9, his mother was found dead in a sitting posture on a sofa in her house There was a round table standing 2 ft from the sofa, on the further side of which was a wineglass three parts filled with a liquid made up of a drink called nectar, which was afterwards shown to contain two grains of cyanide of pottasium There were also on the table a nectar bottle, two lumps of sugar, and a spoon There was no evidence to show that she had taken any of this liquid, and the result of the *post mortem* and of the analysis of the contents of the wine glass was to show she had not died from poisoning by cyanide of pottassium, but that death was most [illegible]

[illegible] live in the house, but he said he had purchased the poison for case hardening a chisel and had placed it in a cupboard in the room where the mother was found dead, and that he thought it possible she might have taken it from there No traces of the poison, however, were found after her death either in the cupboard or in the house There was a good deal of evidence showing that the accused had [illegible]

[1] (1905) 7 Bom L R 985

[2] Nga Waik, (1923) 1 Ran 207

motive for killing his mother, viz., to obtain her money. It was held that the evidence was sufficient to warrant the jury in drawing the inference that the accused had put the cyanide of potassium in the wine-glass with intent to murder his mother. It was urged on behalf of the accused that the act of which the accused was guilty, viz., the putting the poison in the wine-glass was a completed act and could not be and was not intended by the accused to have the effect of killing her at once. *It could not kill unless it were followed by other acts which he might* never have done. But the Court decided that the accused was guilty of attempt to murder[1]. Under illustration (*d*) to this section if a person places poisoned food on another's table intending to kill him he is guilty of attempting to murder. But looking to the wording of this section the poisoned food should have been capable of causing death if it is eaten. In *White's* case it was found that two grains of cyanide of potassium were insufficient to cause death. It seems, therefore, doubtful whether this section would apply in similar circumstances.

3. **'Hurt'.**—See s. 319, *infra*.

Amendment.—Attempts by life-convicts.—This clause was provided by s. 11 of Act XXVII of 1870, because a person attempting to murder might, if hurt was caused, be transported for life or imprisoned for ten years, but where the offender was already transported for life, the law, by a strange oversight, actually awarded no penalty.

CASES.

Death resulting not from the act of the accused but through other causes.—Where a child wrapped in a quilt was abandoned in a thicket close to a house and footpath, and was found very shortly after its exposure, the child having died, not from exposure but from the ignorance of the person who found it and who gave it no food[2]; and where a man struck another on the head with a stick, and believing him to be dead, set fire to the hut with a view to remove all evidence of *the crime, and the Civil Surgeon deposed that the blow only stunned the deceased,* and the death was really caused by the injuries from the burning when the accused set fire to the hut[3], it was held that the offence of attempt to murder was committed.

Mutual infliction of injury.—Two accused in the course of a fight inflicted on each other injuries so serious that their dying depositions had to be taken in both cases. There was no eye-witness to the occurrence; and the evidence in each trial consisted of that of the complainant, the corroborative evidence of the wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence. In separate trials, each was convicted of an offence under this section. It was held that as either of the accused would be entitled, in the event of the other dying of the wounds, to the benefit of a reasonable doubt and to plead that the case came within exception 4 to s. 300, neither accused could be legally convicted under this section[4].

Poison.—Where the accused intentionally put arsenic into her husband's food in order to kill him and the husband died sometime afterwards from inflammation of the brain, and there was no evidence that the poison was even a secondary cause of the deceased's death[5]; and where the accused asked a doctor to supply her with medicine for the purpose of poisoning her son-in-law[6] it was held that an attempt to murder had not been committed. Where a woman ad-

1 *White*, (1910) 22 Cox 325.

2 *Khodabax Fakeer*, (1868) 10 W. R. (Cr.) 52.

3 *Khandu valad Bhavani*, (1890) 15 Bom. 194. The difference of opinion between the Judges in this case was a difference of fact and not of law: Per Walsh, J., in *Khubi*, (1923) 25 Cr. L. J. 703.

4 *Nga Po Theik and Nga Po E.*, (1924) 2 Ran. 558.

5 *Venkatasami*, (1882) Weir, 3rd Edn., 187.

6 *Musst. Bakhtawar*, (1882) P. R. No. No. 24 of 1882.

ministered *dhatura* to three members of her family, who did not die, it was held that an attempt to murder was committed as she must be presumed to have known that the administration of *dhatura* was likely to cause death, although she might not have administered it with that intention[1] But, where the object of administering *dhatura* was to commit robbery, and one of the persons to whom it was administered died and another taken seriously ill, it was held that in respect of the former the offence committed was that of grievous hurt and in respect of the latter the offence fell under s 328[2]

Poison intended for one shared by others.—Where sweetmeat containing arsenic sent to A with the intention of causing her death were also shared by B and C, and none of them died, it was held that the accused was guilty of an attempt to murder not only A but also B and C[3]

Attempt to cause death by suffocation—The accused enticed into her house a boy aged nine years used violence to him and removed several jewels from his person and, being unable to remove his anklets and ear rings tied his wrist and neck with a rope, put a cloth in his mouth, took him into a room and placed

once and looked at the boy but replaced the mill stone The boy untied the rope, and owing to the omission of the accused to watch the jar and the room, got out in the morning and ran home It was held that the accused was rightly convicted under this section[4]

Attempt to discharge a loaded fire-arm—B drew a loaded pistol from his pocket for the purpose of murdering S, but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand and he was at once arrested It was held that he had attempted to shoot[5] On the trial of *an indictment under 24 & 25 Vic, c 100, s 18, which enacts that whosoever* shall unlawfully and maliciously, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled It was held that there was evidence upon which the accused could properly be convicted of an attempt to discharge the revolver within the meaning of the statute[6] During an interview between the accused and the prosecutor, the former drew a loaded revolver from his coat pocket The prosecutor immediately seized the accused and prevented him from raising his arm, a struggle ensued, in the course of which the accused nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him and he was taken into custody During the struggle the accused several times said to the prosecutor, 'you've got to die' It was held that the accused had attempted to discharge the revolver[7]

At a public meeting held in Calcutta a student pointed a five-chambered loaded revolver at Sir Andrew Fraser, Lieutenant Governor of Bengal, and pulled the trigger twice, but owing to the damaged condition of the percussion cap the revolver did not go off He was prosecuted and convicted under this section[8].

1 *Tulsha* (1897) 20 All 143.

2 *Bhagwan Din* (1908) 28 A W N 243

3 *Ladha Singh* (1920) 3 U P L R (L) 12

4 *Mangavalli Ranganayakamma*, (1889) 1 Weir 328

5 *Brown*, (1883) 10 Q B D 381.

6 *Duckworth* [1892] 2 Q B 83.

7 *Linneker*, [1906] 2 K B. 99

8 *J Roy Chowdhury* Unreported case 1908. Criminal Sessions, Calcutta, decided on November 9, 1908.

Where a young man of twenty-five and accustomed to shooting was found to have fired at a person at a distance only of some six paces, the cartridge containing shot of about No. 6 size, it was held that he must have known that his act was likely to cause death. If the person shot at had died, the accused would undoubtedly have been guilty of murder. The fact that the back of the chair on which the victim was seated intercepted a number of bullets and thus avoided a fatal result was held not to reduce the offence from one under this section to one under s. 324[1].

Where two persons fire at another and one only actually hits and kills him, the other is not guilty of murder under ss. 302 and 34, but of attempt to murder[2].

PRACTICE.

Evidence.—Prove (1) that the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death; or

that it was done with the intention of causing such bodily injury as (*a*) the accused knew to be likely to cause death; or (*b*) was sufficient in the ordinary course of nature to cause death; or

that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (*a*) death, or (*b*) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

The Court can convict the accused of offences under this section read with s. 34 or 114, although he is charged only with offences under this section and ss. 148 & 149[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or* knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of murder [and that you caused hurt to the said AB by the said Act] and thereby committed an offence punishable under s. 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (*d*), and 12 (2); the Burma Laws Act, 1898, s. 4 (3) (*b*); and the Criminal Tribes Act, 1897, s. 6, apply to offences under this section.

Mental incapacity.—In awarding punishment the fact that the accused had contracted the habit of taking morphia and was a very fickle-minded person was taken into consideration although there was no indication of a plainly marked mental aberration[4].

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a

1 *Abdul Rahaman*, (1908) 9 C. L. J. 432.
2 *Nirmal Kanta Roy*, (1914) 41 Cal. 1072.
3 *Ranchhod Sursang*, (1924) 26 Bom. L. R. 954, 7 Bom. Cr. C. 197, 49 Bom. 84.
4 *Alexander Ruffee*, (1912) P. W. R. No. 24 of 1912.

term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

ILLUSTRATION

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder A has committed the offence defined in this section.

COMMENT.

The wording of this section is the same as that of the preceding one except that it deals with an attempt to commit culpable homicide The punishment provided is therefore not so severe

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted[1]

PRACTICE.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or* knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of culpable homicide not amounting to murder [and that you caused hurt to the said AB by the said act] and thereby committed an offence punishable under s 308 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss 11 (3) (*d*) and 12 (2) and the Criminal Tribes Act, 1897, s 6, apply to offences under this section.

309. Whoever attempts to commit suicide[1] and does any act towards the commission of such offence[2], shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

Attempt to commit suicide

COMMENT.

This is the only instance in which an attempt to commit an offence is punishable but where actual commission cannot be punished.

1. **'Commit suicide'.**—To 'commit suicide' is for a person voluntarily to do an act (or, as it is submitted, to refrain from taking [illegible] nce), for the purpose of [illegible] and hav[illegible] consequence,

2. [illegible] **the commission of such offence'.**—Such act must be in the course of the attempt

Where a woman with [illegible] in a well, actually ran tow[illegible] she was not guilty of atte[illegible]

[1] Stephen's Digest of Criminal Law, Art. 59.

[2] *Clift v. Schwabe*, (1846) 3 C. B. 437.

Where a young man of twenty-five and accustomed to shooting was found to have fired at a person at a distance only of some six paces, the cartridge containing shot of about No. 6 size, it was held that he must have known that his act was likely to cause death. If the person shot at had died, the accused would undoubtedly have been guilty of murder. The fact that the back of the chair on which the victim was seated intercepted a number of bullets and thus avoided a fatal result was held not to reduce the offence from one under this section to one under s. 324[1].

Where two persons fire at another and one only actually hits and kills him, the other is not guilty of murder under ss. 302 and 34, but of attempt to murder[2].

PRACTICE.

Evidence.—Prove (1) that the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death; or

that it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death; or

that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

The Court can convict the accused of offences under this section read with s. 34 or 114, although he is charged only with offences under this section and ss. 148 & 149[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or* knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of murder [and that you caused hurt to the said AB by the said Act] and thereby committed an offence punishable under s. 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (*d*), and 12 (2): the Burma Laws Act, 1898, s. 4 (3) (*b*); and the Criminal Tribes Act, 1897, s. 6, apply to offences under this section.

Mental incapacity.—In awarding punishment the fact that the accused had contracted the habit of taking morphia and was a very fickle-minded person was taken into consideration although there was no indication of a plainly marked mental aberration[4].

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a

1 *Abdul Rahaman*, (1908) 9 C. L. J. 432.
2 *Nirmal Kanta Roy*, (1914) 41 Cal. 1072.
3 *Ranchhod Sursang*, (1924) 26 Bom. L. R. 954, 7 Bom. Cr. C. 197, 49 Bom. 84.
4 *Alexander Ruffee*, (1912) P. W. R. No. 24 of 1912.

Where a young man of twenty-five and accustomed to shooting was found to have fired at a person at a distance only of some six paces, the cartridge containing shot of about No. 6 size, it was held that he must have known that his act was likely to cause death. If the person shot at had died, the accused would undoubtedly have been guilty of murder. The fact that the back of the chair on which the victim was seated intercepted a number of bullets and thus avoided a fatal result was held not to reduce the offence from one under this section to one under s. 324[1].

Where two persons fire at another and one only actually hits and kills him, the other is not guilty of murder under ss. 302 and 34, but of attempt to murder[2].

PRACTICE.

Evidence.—Prove (1) that the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death; or

that it was done with the intention of causing such bodily injury as (*a*) the accused knew to be likely to cause death; or (*b*) was sufficient in the ordinary course of nature to cause death; or

that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (*a*) death, or (*b*) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

The Court can convict the accused of offences under this section read with s. 34 or 114, although he is charged only with offences under this section and ss. 148 & 149[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or* knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of murder [and that you caused hurt to the said AB by the said Act] and thereby committed an offence punishable under s. 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (*d*), and 12 (2); the Burma Laws Act, 1898, s. 4 (3) (*b*); and the Criminal Tribes Act, 1897, s. 6, apply to offences under this section.

Mental incapacity.—In awarding punishment the fact that the accused had contracted the habit of taking morphia and was a very fickle-minded person was taken into consideration although there was no indication of a plainly marked mental aberration[4].

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a

1 *Abdul Rahaman*, (1908) 9 C. L. J. 432.
2 *Nirmal Kanta Roy*, (1914) 41 Cal. 1072.
3 *Ranchhod Sursang*, (1924) 26 Bom. L. R. 954, 7 Bom. Cr. C. 197, 49 Bom. 84.
4 *Alexander Ruffee*, (1912) P. W. R. No. 24 of 1912.

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of—— at——, attempted to commit suicide and did an act, to wit——, towards the commission of it, and you thereby committed an offence under s 309 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session, *or* High Court)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Punishment —This section requires the Court to pass a substantive sentence of imprisonment A sentence of fine and of imprisonment in default of payment is an illegal sentence[1] But sentences should not be passed in cases of attempt to commit suicide, where the accused suffers from a bodily affection which is likely to cause him acute mental depression[2]

310 Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery[1] or child stealing by means of or accompanied with murder[2], is a thug

Thug

COMMENT.

This and the following section incorporate the provisions of the Thugee Act, 1836

1. **'Robbery'**.—See s 390
2. **'Murder'** —See s 300

311 Whoever is a thug shall be punished with transportation for life, and shall also be liable to fine

Punishment.

COMMENT

Gangs of persons habitually associated for the purpose of inveigling and murdering travellers or others in order to take their property etc, are called thugs Thugs are robbers and dacoits, but robbers and dacoits are not Thugs Thugs committed robbery or dacoity or kidnapping always accompanied with murder killing of the victim was the essential thing Thugs have practically [illegible] heir doings are extremely [illegible] nem [illegible] others for the purpose of [illegible] tual commission of any act is not necessary [illegible] with a slight alteration are incorporated in

PRACTICE.

Evidence —Prove (1) that the accused was associated with other person of persons

(2) That he was so associated after the passing of this Code

(3) That such persons including the accused were associated for the purpose of committing robbery, or child stealing by means of, or accompanied with murder

(4) That such persons were habitually associated for that purpose[3]

[1] Weir 3rd Edn 192.
[2] *Appulsawmy* (1904) 2 L. P R. 30
[3] *Lim* (1881) P R No 23 of 1881

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a Thug, and that you thereby committed an offence punishable under s. 311 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Criminal Tribes Act, 1897, s. 6, applies to offences under this section.

Of the Causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

Causing miscarriage.

312. Whoever voluntarily causes a woman with child to miscarry[1] shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman[2], be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child[3], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

COMMENT.

This section deals with the causing of miscarriage with the consent of the woman, while the next section deals with the causing of miscarriage without the consent.

The authors of the Code observe: "With respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty"[1]. This offence is, therefore, taken out of the cognizance of the police.

Ingredients.—This sections requires two essentials :—

1. Voluntarily causing a woman with child to miscarry.
2. Such miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

[1] *Note M*, p. 151.

1. 'Whoever voluntarily causes a woman with child to miscarry'.—The offender may be the woman herself or any other person

'Voluntarily'.—See s 39, *supra*

'With child' means pregnant and it is not necessary to show that 'quickening' that is perception by the mother of the movements of the fœtus has taken place or that the embryo has assumed a fœtal form, the stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial Where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month and that there was nothing which could be called fœtus or child, it was held that the acquittal was bad in law[1]

2 'Such miscarriage be not caused in good faith for the purpose of saving the life of the woman'—Miscarriage is the premature expulsion of the child or fœtus from the mother's womb at any period of pregnancy before the term of gestation is completed Where a child was full grown a conviction under this section was set aside and one under s 511 for attempt to bring about miscarriage was maintained[2] The offence defined in this section can only be committed when the woman is in fact pregnant[3] For although there may be a guilty intention and attempt to commit it on the person of a woman believed to be but who really is not pregnant the offence as here defined seems to require that the woman should be with child If it appear that the woman was not with child at all the accused must be acquitted[4]

'Good faith'.—See s 2 *supra*

3 'Quick with child—Quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy The symptoms are popularly ascribed to the first perception of the movements of the fœtus But quickening is not a constant uniform and well marked distinction of the pregnant state[5] Quick with child is having conceived with quick child is when the child has quickened[6]

It has been held under an English statute that the expression quick with child means when the woman has felt the child move within her

PRACTICE

Evidence—Prove (1) that the woman was with child or (if under the second clause) that she was quick with child

(2) That the accused did some act likely to cause a miscarriage

(3) That he did so voluntarily

(4) That such woman did miscarry in consequence

(5) That such miscarriage was not caused in good faith in order to save the woman's life

Procedure—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge—I (*name and office of Magistrate etc*,) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, voluntarily caused (*name of the woman*) then being with child to miscarry such miscarriage not being caused by you in good faith for the purpose of saving the life of the said—, and thereby

1 [illegible]
2 [illegible]
3 [illegible]
4 [illegible]
5 M & M [illegible]

6 Per Gurney J in *Jane Wycherley* (1838) 8 C. & P 262 264

7 *Anon*., (1811) 3 Camp. 73. This case was decided under s. 1 of 43 Geo III c 58 which is now repealed.

committed an offence punishable under s. 312 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—In awarding punishment where a woman has caused herself to miscarry, it should not be forgotten that "the high caste young widow, who, to hide her shame, should, at the risk of life, cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry"[1].

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in the last preceding section without the consent[1] of the woman, whether the woman is quick with child[2] or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

When the consent of the woman is not taken the offence comes under this section. When the consent is taken then s. 312 applies. Again, under this section the person procuring the abortion is alone punished: under s. 312 such person as well as the woman who causes herself to miscarry are both punished.

1. **'Consent'.**—See s. 90, *supra.*
2. **'Quick with child'.**—See s. 312, *supra.*

PRACTICE.

Evidence.—Prove the same points as those required in s. 312: and further it must be established that the woman did not consent to such abortion.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under s. 313 of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

Death caused by act done with intent to cause miscarriage.

314. Whoever, with intent to cause the miscarriage of a woman with child[1], does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

1 Law Commissioners' 1st Rep., s. 349.

and if the act is done without the consent[2] of the woman, shall be punished either with transportation for life or with the punishment above mentioned

If act done without woman's consent.

Explanation —It is not essential to this offence that the offender should know that the act is likely to cause death.

COMMENT

This section provides for the case where death has occurred in causing miscarriage Under it, it is immaterial whether the woman was pregnant or not and whether the act done was or was not intended or known to cause her death

This species of homicide may be committed involuntarily that is, in the language of the Code, by a person who does not intend to cause (or think it likely that he will cause) death by the act which he does If A intending only to cause miscarriage to Z involuntarily does an act which causes her death, he is liable to punishment under this section And he is thus liable whether he acts with caution in order to prevent risk to Z's life or whether he acts rashly or negligently Even if he takes such precautions that there is no reasonable probability that Z's death will be caused, and if the medicine is rendered deadly by some accident which no human sagacity could foresee or by some peculiarity in Z's constitution, such as there was no ground whatever to expect, A will be liable to punishment under this section for causing death by an act done with intent to cause miscarriage[1]

1 **'Intent to cause the miscarriage of a woman with child'** —Even though the woman is not pregnant, yet if the death is caused by administering a drug under the belief that she was so, the offence will probably come under this section Where a husband procured sulphate of potash and gave it to his wife intending her to take it for the purpose of procuring abortion and she believing herself to be pregnant although in reality she was not, took it and died from its effects it was held that he was guilty of manslaughter[2] Where a poisonous drug was administered to a woman to procure miscarriage, and it was not proved that the accused knew that the drug was likely to cause death it was held that they had committed an offence under this section[3] The accused at the request of a pregnant woman who wished to procure abortion obtained for her a poisonous drug He knew the purpose for which she wanted it and though he gave it to her for that purpose, he was unwilling that she should use it, and he did not administer it to her or cause her to take it She, however, took it for the purpose assigned, and died in consequence It was held that the accused was not liable to be convicted on an indictment for the murder of the woman[4]

2 **'Consent'** —The consent of the woman freely and intelligently given is allowed to mitigate the offence If A kills Z by administering abortives to her with the knowledge that those abortives are likely to cause her death he is guilty of culpable homicide, which will be culpable homicide by consent, if Z agrees to run the risk, and murder, if Z did not so agree

As to the definition of 'consent' see s 90, *supra*

PRACTICE

Evidence —Prove (1) that the woman was with child

(2) That the accused did an act to cause miscarriage

(3) That he did so with that intention

1 M & M 290

2 *William Gaylor* (1857) D & B 288. See *Whitchurch* (1890) 24 Q B D 420

3 *Kalachand Gope* (1868) 10 W R (Cr) 59

4 *Fretwell*, (1862) 31 L J (M C) 145. See *William Gaylor* sup

(4) That such act caused the death of the woman.

(5) (If the case comes under the second clause) *that such act* was done by the accused without the consent of the woman.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, with intent to cause the miscarriage of (*name of the woman*) did a certain act, to wit——, which caused the death of the said——, and thereby committed an offence punishable under s. 314 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court.)

And I hereby direct that you be tried by the said Court on the said charge.

Act done with intent to prevent child being born alive or to cause it to die after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith[1] for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

COMMENT.

The offence which this section punishes is the injury to the child's life.

Any act done with the intention here mentioned which results in the destruction of the child's life, whether before or after its birth, is made punishable.

1. **'Good faith'.**—See s. 52, *supra*.

English law.—If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by his misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it the less a murder.

PRACTICE.

Evidence.—Prove (1) that the woman was with chid.

(2) That the accused did an act, before the child was born, calculated to prevent the child from being born alive, or to cause it to die after its birth.

(3) That such act was done by the accused with that intention.

(4) That such act was done, not in good faith, for the purpose of saving the mother's life.

(5) That the child was born dead, or died after its birth.

(6) That such death was caused by the abovementioned act of the accused.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should describe the act by which the accused intended to prevent the child being born alive, and should also state that the act was not caused in good faith for the purpose of saving the mother[1]

Form—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows.—

That you, on or about the——day of——, at——, did an act, to wit——, to XY before the birth of her child, with the intention of thereby preventing that child from being born alive (*or* causing it to die after its birth), and by that act did prevent that child from being born alive (*or* caused it to die after its birth) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under s 315 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Causing death of quick unborn child by act amounting to culpable homicide

316 Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick[1] unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATION,

A knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide The woman is injured but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused A is guilty of the offence defined in this section

COMMENT,

This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where the death is caused after the quickening and before the birth of the child Any act or omission of such a nature and done under such circumstances as would amount to the offence of culpable homicide, if the sufferer were a living person, will, if done to a quick unborn child, whose death is caused by it, constitute the offence here punished If a person strikes a pregnant woman and thereby causes the death of her quick unborn child, he will be guilty of the offences here defined, if the blow was intended by him to cause the woman's death or was one which he knew or had reason to believe to be likely to cause it[2]

1. **'Quick'.**—See s 312, *supra*

PRACTICE

Evidence.—Prove (1) that the woman was quick with child

(2) That the accused did an act to cause the death of such child

(3) That the circumstances, under which such act was done, were such as to make the accused guilty of culpable homicide, if death had been caused (See s 300)

(4) That such act did cause the death of the quick unborn child

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

[1] (1865) 3 W R (Cr L) 5   [2] W & M 282

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, under circumstances, to wit——, that if you thereby caused death, you will be guilty of culpable homicide, and did by such act cause the death of a quick unborn child of XY, and you thereby committed an offence punishable under s. 316 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Exposure and abandonment of child under twelve years, by parent or person having care of it.

317. Whoever, being the father or mother[1] of a child under the age of twelve years[2], or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child[3], shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation[4].—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure[5].

COMMENT.

Object.—This section is intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner, that the children, not being able to take care of themselves, may run the risk of dying or being injured. It does not apply when children are left under the care of others[1].

Scope.—This section applies where a child is exposed and no death supervenes; if, however, death follows, the conviction must be under s. 304[2]. The offence is complete notwithstanding that no actual danger or risk of danger arises to the child's life.

Ingredients.—The section has three essentials—

1. The person coming within its purview must be father or mother or must have the care of the child.
2. Such child must be under the age of twelve years.
3. The child must have been exposed or left in any place with the intention of wholly abandoning it.

1. 'Whoever, being the father or mother..., or having the care of such child'.—Both are equally bound by ties of duty, and this equally whether the child be born in wedlock or be illegitimate. An infant requiring nurture, or a child of tender years, will ordinarily be in the immediate charge of the mother, the father's duty being that of providing for both the mother and the offspring. The person who has the immediate care of the child is the person contemplated. A parent who is absent, but who has provided duly for the maintenance and protection of his child, would not be criminally answerable for its abandonment by the person in whose charge he had left it. The offence consists in the desertion of the child by a person who is bound by nature to support and *protect it*, or who has taken on himself that duty, whether by adopting the child, or by way of contract with the

[1] *Felani Hariani,* (1871) 16 W. R. (Cr.) 12; *Mussumat Khairo,* (1872) P. R. No. 33 of 1872; *Mussammat Bhuran,* (1877) P. R. No. 5 of 1878; *Mussammat Bhagan,* (1878) P. R. No. 4 of 1879.

[2] *Banni,* (1879) 2 All. 349.

parent, or in some other way[1] Any person receiving an infant from its mother on the understanding that the mother never desired or wished to have it back again, must b... ... The ... of a newly born child, ... and left it ... milk was le... and s 109 and her sister under this section only[2]

2 **'Age of twelve years'** —Twelve years is fixed as the period under which a child cannot be abandoned

3 **'Expose or leave such child in any place with the intention of wholly abandoning such child'** The word 'expose' literally means to physically put outside, so that such putting outside involves some physical risk to the person put out Having reference to a child, it would mean putting it somewhere where it could not receive the protection necessary for its tender age as for instance putting it outside the house whereby it would be exposed to the risk of climate wild beasts and the like The exposure contemplated by the act was one by which danger to life might immediately ensue[3] But the Madras High Court has held that it is not necessary that the exposure and abandonment must be under such circumstances as to endanger the life or the health of the child The only intention required to complete the offence is an intention of wholly abandoning the child[4]

'Leave' —As this word comes in immediate juxtaposition with the word expose the word 'leaving means leaving in a sense *ejusdem generis* as the exposure and indicates an offence only slightly distinguishable from exposing It cannot mean leaving in the large sense of abandonment, but must be construed in strict connection with the word 'exposure The narrower construction of the words 'expose or leave is much strengthened by the insertion of those striking words in any place' "[5] "In order to make the 'leaving' of a child an offence under s 317 the child must be left *without protection* I think this is clear in the first place because the word 'leave being coupled in that section with the word expose, must on the principle *noscitur ex sociis* be considered as to some extent taking its colour from the word expose, and must be construed as meaning leave under circumstances more or less resembling those of an exposure I think this is clear further from the intention which is expressly required by the section to constitute the offence There must be an intention wholly to *abandon* the child now I think an intention wholly to abandon the child means something more than an intention to go away from it and never to return to it The phrase to abandon a child in its ordinary acceptance means something more than merely to go away from it In fact it seems to me that here again the idea of leaving *without protection* comes in[6]

'With the intention of wholly abandoning such child' —The gist of the offence is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving and the consequences likely to ensue are not essential ingredients though they may be taken into consideration in passing the sentence[7] ... ry abandonment[8] ... the consequences ... child by leaving it in a place which was quite close to a village and near a public road, and the child

1 M & M 284
2 *Cripps* (1916) 18 Bom L R 031 3 Bom Cr C 217 41 Bom 152
3 Per Blair J in *Mirchia* (1896) 18 All 364 366
4 *Boya Sunkulamma* (1890) 1 Weir 331
5 *Mirchia* sup p 366
6 Per Fitzpatrick J in *Mussammat ...* 18 ...
7 ...
8 ... (1917) 21 Cr L J 2..

was soon discovered, it was held that she was guilty of this offence[1]. A woman, mother of an illegitimate child, six months old, left it in charge of a blind woman saying she would soon return. She went away to another village and did not return: and apparently she never intended to return. It was held that she could not be convicted under this section[2]. The accused, a married woman, eloped leaving her child, one and a half months old, in the house of her husband. It was held that this was not a "leaving with the intention of wholly abandoning the child"[3].

English cases.—A, the mother of a child five weeks old, and B put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool, and A, with the connivance of B, took the hamper to a railway station, paid for its carriage, and told the clerk to send it to G. She said nothing as to the contents of the hamper, which was delivered to the father of the child at G. The child died three weeks afterwards from causes not attributable to the conduct of A and B. It was held that they were guilty of abandoning and exposing the child[4]. A woman who was living apart from her husband, and who had the actual custody of the child, brought the child, and left it at the father's door, telling him he had done so. He knowingly allowed it to remain from about 7 P.M. till 1 A.M., when it was removed by a constable, the child being then cold and stiff. It was held that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered[5].

4. Explanation. The explanation indicates "with much clearness the scope and purview of the section and the nature of the evil against which it sought to provide. That explanation provides for the case of injuries actually ensuing that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, i.e., for murder or culpable homicide, as the case may be"[6]. Though the death of the child may not ensue the offence may amount to an attempt punishable under s. 307. See ill. (*b*) to that section.

5. 'If the child die in consequence of the exposure'.—This expression means 'dies from cold or other result of exposure'. Hence, where a new-born child was exposed, and it died after, but not, except remotely, on account of its exposure, the mother was acquitted of murder and convicted under this section[7]. Where a woman deserted her illegitimate child of ten days old, but under circumstances in which it could and, as a matter of fact, did, obtain food, and the child died after four days from natural causes, it was held that the mother could not be convicted under this section[8].

PRACTICE.

Evidence.—Prove (1) that the child is under twelve years of age.

(2) That the accused is the father or mother, or person having the care of that child.

(3) That he exposed or left such child in the place in question.

(4) That he so exposed or left the child with the intention of wholly abandoning it.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

1 *Kundan*, (1903) 23 A. W. N. 43.
2 *Mirchia*, (1896) 18 All. 364.
3 *Mussammat Bhuran*, (1877) P. R. No. 5 of 1878; *Mussammat Bhagan*, (1878) P. R. No. 4 of 1879.
4 *Falkingham*, (1870) L. R. 1 C. C. R. 222.
5 *White*, (1871) L. R. 1 C. C. R. 311.
6 Per Blair, J., in *Mirchia*, sup., p. 366.
7 *Khodabux Fakeer*, (1868) 10 W. R. (Cr.) 52.
8 *Jeoni*, (1893) 13 A. W. N. 100.

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you being the father (*or* mother *or* having the care) of a certain child under the age of twelve years to wit—, of the age of——years, did expose or leave the said child in a certain place to wit—— with the intention of wholly abandoning the said child and thereby committed an offence punishable under s 317 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

318 Whoever, by secretly burying or otherwise disposing of the dead body of a child[1] whether such child die before or after or during its birth[2], intentionally conceals or endeavours to conceal the birth[3] of such child shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both

Concealment of birth by secret disposal of dead body

COMMENT

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disgrace It is commonly the fear of shame which is its cause it needs a greater shame to repress it

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3 Intention to conceal the birth of such child by such secret burying or disposal

1 **'Secretly burying or otherwise disposing of the dead body of a child'** —This includes every possible mode of disposing of the body It is sufficient if the body is temporarily concealed with the intention of removing it elsewhere when opportunity offered[1]

This section

the case of a person

under the last sectio

offence under this section is not committed if the body is left in a public place[2]

'd in two boxes but not locked or fastened one

a bed room but in such a position as to attract

resorted to the room was held to be not a secret disposition of the body[3] It was held similarly where the dead body of a child was placed on a dung heap quite close to a public road[4] But where a woman threw a child down a privy and where a woman placed a living child in a place of concealment and on subsequently re visiting that place found the child dead

1 *Mt Sukhdei* (1900) 13 C. P L. R. 169.
2 *Abbas B* [1911] 2 M W N 3 9
3 *Jane George* (1868) 11 Cox 41
4 *Musammat Bakhtawari*, (1913) P W R. (Cr) No 23 of 1913.
5 *Elizabeth Cornwall* (1817) R. & R 336
Ann Coxhead (184) 1 C. &
6 *Hughes* (1850) 4 C

thereof, by depositing the child while alive in a corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner, it was held that she could not be convicted of secretly "disposing of the dead body of a child"[1].

No endeavour to conceal the birth of a child.—Where a woman having been delivered of a dead child left it at the place of birth which was in the compound of her house and told no one about it, she was not guilty of this offence[2]. The accused, being pregnant with an illegitimate child, went to the village jungle for purposes of nature and there, in the presence of another woman, gave birth to a child which died immediately. The dead body was left on the spot where the birth took place and was there discovered two or three days afterwards. It was held that the mere leaving of the body where the birth took place did not constitute an offence under this section as it did not amount to a secret disposal[3]. A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the Court directed an acquittal on a charge of endeavouring to conceal the birth[4].

'Child'.—Under this section it is sufficient to show that a 'child' was born and that it was sufficiently developed to have lived if born alive[5].

Concealment of the birth of a fœtus four months old is no offence[6]; but if the fœtus is six[7] or seven[8] months old its concealment is an offence. "This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive"[9]. But in a later case it has been laid down that the word 'child' is not to be limited to a child likely to live or likely to die, but that as soon as the fœtus has the outward appearance of a child it is sufficient. A fœtus not bigger than a man's finger, but having the shape of a child was, therefore, held to be 'a child'[10].

2. 'Whether such child die before or after its birth'.—The offence under this section is in respect of concealment of birth by a secret disposal of the dead body of a child. It is, therefore, not material when such child died.

3. 'Intentionally conceals, or endeavours to conceal, the birth'.—The offence becomes complete when the birth, i.e., the delivery of a child dead or living is concealed by any means[11]. The endeavour to conceal the birth of a child by a secret disposition of the body must be by putting it into some place where it is not likely to be found. Placing it in an open box in the accused's bed-room,

1 *Jane May*, (1867) 10 Cox 448.
2 *Amina*, (1892) Unrep. Cr. C. 607.
3 *Mt. Saraswati*, (1905) 1 N. L. R. 89; *Mt. Piara*, (1883) 5 C. P. L. R. (Cr.) 29, where it was held to the contrary, dissented from.
4 *Sarah Higley*, (1830) 4 C. & P. 366.
5 *Radha kom Rangu*, (1899) 1 Bom. L. R. 155; *Mi Pyo Nyo*, (1905) U. B. R. (P. C.) 27.
6 (1869) 4 M. H. C. App. 63.
7 *Kasai*, (1891) Cr. R. No. 55 of 1894, Unrep. Cr. C. 727; *Hewitt*, (1856) 4 F. & F. 1101.
8 *Sunna*, (1884) 1 Weir 334.
9 Per Earle, J., in *Berriman*, (1854) 6 Cox 388, 390; *Mt. Bilace*, (1887) 2 C. P. L. R. 153.
10 *Colmer*, (1864) 9 Cox 506.
11 *Lalbu*, (1898) Cr. R. No. 15 of 1898, Unrep. Cr. C. 961; *Mi Pyo Nyo*, (1905) U. B. R. (P. C.) 27.

and afterwards, on enquiry by [illegible] was in the box where it was found [illegible] The evidence of a secret disposition [illegible] body is placed[2]. If any concealment or disposition of the dead body of a child is made, it does not matter whether it be final or temporary[3] Where, therefore, a woman placed the dead body of a child between a bed and a mattress,[4] or placed it upon her bed and covered it over with a petticoat[5], it was held that this offence was not committed If the mother causes the body of her child to be secretly buried with a view to conceal the birth the offence is complete even though she may have previously allowed the birth to be known to some other persons[6]

Abetment.—Where the accused gave her new born illegitimate dead child to a woman with instructions to dispose of it secretly, and the latter carried out the instructions by throwing it into a river, it was held that the accused was not guilty of the substantive offence under this section, though the facts more appropriately came under the definition of abetment[7]

PRACTICE

Evidence —Prove (1) the birth of the child

(2) That the child died either before, during, or after, its birth

(3) That the accused buried or otherwise disposed of the dead body

The accused should have done some act of disposal of the body after the child was dead[8] The dead body must be found, and identified as that of the child of which she is alleged to have been delivered[9]

(4) That such burial or disposal of the body was secretly done

(5) That the accused thereby intentionally concealed, or endeavoured to conceal, the birth of such child

Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth[10]

Procedure —Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session Presidency Magistrate, or Magistrate of the first class

Unless there is clear evidence of murder against a person secretly disposing of the dead body of a child which is found to have been killed after its birth, such person should not be charged and tried for murder but must be convicted under s 318 for concealing the birth of the child[11]

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, by secretly burying (*if any other mode adopted specify that mode*) the dead body of a certain child to wit—— the child of AB, intentionally concealed (or endeavoured to conceal) the birth of the said child and thereby committed an offence punishable under s 318 of the Indian Penal Code and within my cognizance [or within the cognizance of the Court of Session (or High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

1 *Sleep* (1864) 9 Cox 559
2 *Elizabeth Brown* (1870) L. R. 1 C. C. R. 244
3 *Farnham* (1845) 1 Cox 349
4 *Sarah Cornwall* (1841) Car & M. 335
5 Moody 244 *Jane Perry* (18..) 6 Cox 531
6 *Rosenberg* (1906) 70 J P 264
7 *Frances Douglas* (1836) 1 Moody Cr C. 480
8 *Bose* (1835) Cr. R. No. 40 of 18[illegible] Cr C. 775
9 *Harriet Turner* (1839) 8 C & P [illegible]
10 *Mary Williams* (1871) 11 Cox [illegible]
11 [illegible]

Of Hurt.

Hurt. **319.** Whoever causes bodily pain[1], disease or infirmity[2] to any person[3] is said to cause hurt.

COMMENT.

The authors of the Code say: "Many of the offences which fall under the head of hurt will also fall under the head of assault. A stab, a blow which fractures a limb, the flinging of boiling water over a person, are assaults, and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious potion, and places it on the table of another; a person who conceals a scythe in the grass on which another is in the habit of walking; a person who digs a pit in a public path, intending that another may fall into it, may cause serious hurt, and may be justly punished for causing such hurt; but they cannot, without extreme violence to language, be said to have committed assaults. We propose to designate all pain, disease and infirmity by the name of hurt"[1].

"The definition of hurt...appears to contemplate the causing of pain, etc., by one person to another"[2].

Acts neither intended nor likely to cause death amount to hurt or grievous hurt according to the nature of injury caused even though death has resulted therefrom.

1. **'Bodily pain'.**—Harm so slight, that no person of ordinary sense and temper would complain of it, is excluded by s. 95. Severe bodily pain will fall within the definition, no matter whatever may be the duration of such pain. Where a bailiff proceeded to the premises, and on the occupant's wife refusing to vacate, pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries, it was held that he was legally justified in the employment of such amount of force and could not be convicted therefor under s. 323[3].

2. **'Infirmity'.**—This term has been defined "as inability of an organ to perform its normal function which may either be temporary or permanent"[4].

3. **'To any person'.**—That is, any other person but himself[5].

Act neither intended nor likely to cause death is hurt even though death is caused.—Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of hurt only if the injury caused was not serious. Where the accused with a view to chastising her daughter, eight or ten years old, for impertinence, gave her a kick on the back and two slaps on the face, the result of which was death[6]; where the accused, taking offence at an insult offered him by his companion in a drunken brawl, threw him down upon the ground, and stamped his feet upon him, which caused his death within twenty days[7]; and where the accused threw his stick at the deceased with such force that it hit the deceased on the head and made a punctured wound which caused his death[8], it was held that the offence of voluntarily causing hurt had been committed. Where an accused person had struck a man one blow on the head with a bamboo yoke and the injured man died afterwards in hospital principally from the excessive use of opium

[1] Note M, p. 151.
[2] Per Elsmie, J., in *Madho Singh,* (1878) P. R. No. 22 of 1878.
[3] *Meredith* v. *Sanjibani Dasi,* (1914) 42 Cal. 313.
[4] *Anis Beg,* (1923) 46 All. 77.
[5] *Madho Singh, sup.*
[6] *Beshor Bewa,* (1872) 18 W. R. (Cr.) 29.
[7] *Radkia Badru,* (1872) Cr. R. Oct. 1871, Unrep. Cr. C. 67.
[8] *William Keegan,* (1893) Cr. R No. 38 of 1893, Unrep. Cr. C. 673.

surreptitiously administered by his friends, it was held that the offence committed was that of voluntarily causing hurt as there was no intention to cause death and the blow in itself was not of such a nature as was likely to cause death[1] The accused after a trivial domestic quarrel, beat his wife with a light stick, with the result that she fell down and expired The medical evidence showed that the deceased was a thin and poorly developed woman, that her brain was anæmic, but otherwise all the internal organs were healthy and uninjured no bones were broken, but there were many bruises on the body, and death had been due to shock It was held that as all the physical injuries sustained by the deceased were simple hurts, the accused should be convicted of an offence under this section as he could not have known that his wife's brain was anæmic, or that the shock of a severe beating would prove fatal to her The Court remarked In cases of this class it is an axiom of the administration of the criminal law that an accused person should be convicted and punished for the hurt which he intended to cause, or might reasonably be held likely to cause by the act done and not for an unfortunate and entirely unforeseen result of that act [2] Where in a sudden fight between G, S and M on one side, and D, R and I on the other for which G on his side and D on the other side were chiefly to blame and in which blows of ordinary sticks and of [illegible] od close [illegible] me and [illegible] D did so nor was there any indication that originally D or any member of his party intended or knew it to be likely that any such serious injury would be caused, it was held that D could not be convicted of an offence either under s 304 or s 325 and his party were only responsible for simple hurt under s 323[3] Where, on K being assaulted by B, a number of persons rushed to the scene and a fracas occurred in which B was killed, and K and the other persons forming the assembly were convicted under s 147 and some of them under s 323 also, it was held that the convictions under s 147 were not sustainable, the common object of the crowd being to rescue K and not to assault B that in so far as excessive force had been used by some members of the assembly the users of such force were liable to be punished for the assaults committed by them, and not the other members of the assembly, and that in the absence of proof as to who actually dealt the fatal blow to B no member of the assembly was punishable in respect of that blow[4]

For further cases in which the act of the accused amounted to grievous hurt see p 772

CASES

Poisoning.—The accused, a boy of about sixteen years of age, being in love [illegible] them were seized with more or less violent symptoms of *dhatura* poisoning, though none of them died There was no evidence to show that the boy who actually handed over the *pera* knew that they contained anything harmful It was held that the accused was guilty of hurt[5]

Spleen cases—Where a woman died from a chance kick in the spleen, not known to be diseased inflicted by her husband on provocation, and, the husband had no intention or knowledge that the act was likely to cause hurt, endangering

[1] Nga Shwe Po, (1883) S J L B 179

[2] *Muhammad Ali* (1909) P L R No 157 of 1913.

[3] *Dhani Ram*, (1912) P. W R (Cr) No 1 of 1913 P L R No 162 of 1913

[4] *Ambika Singh* (1921) 1 Pat 212

[5] *Anis Beg* (1923) 46 All 77

human life, it was held that he was guilty of an offence uner this section and s. 321[1]. Where the accused beat and kicked the deceased whereby the deceased's spleen, which was in a diseased condition, was ruptured and he died[2]; where the accused kicked a punkha-puller who had an enlarged spleen which was not known to the accused, and death ensued[3]; where the accused caused the death of another person by throwing a piece of brick at him which struck him in the region of the spleen and ruptured it, the spleen being diseased[4], it was held that as the accused had not the intention to cause death, or to cause such bodily injury as was likely to cause death, the offence committed was that of voluntarily causing hurt.

Hair-pulling—Pulling a woman by the hair amounts to this offence[5].

Stone-throwing.—Where the accused who had a quarrel with his debtor over non-discharge of a loan, pelted brick-bats at his house knowing that there were occupants in it, and hurt one of them who was under medical treatment for ten days, it was held that he was guilty of causing hurt[6].

Grievous hurt.

320. The following kinds of hurt only are designated as "grievous":—

First.—Emasculation[1].

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration[2] of the head or face.

Seventhly.—Fracture or dislocation of a bone[3] or tooth.

Eighthly.—Any hurt which endangers life[4] or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits[5].

COMMENT.

The authors of the Code observe: "We have found it very difficult to draw a line between those bodily hurts which are *serious* and those which are *slight*. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.

"We have, therefore, designated certain kinds of hurt as *grievous*.

"We have given this name to emasculation,...to the fracture and to the dislocation of bones. Thus far we proceed on sure ground. But a more difficult task remains. Some hurts which are not, like those kinds of hurt which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer, nor blinds him, nor destroys his hearing, nor deprives him of a member

1 *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29; *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97; *Phimni Ramudu*, (1881) Weir, 3rd Edn., 162; *Nga Kyin*, (1893) 1 U. B. R. (1892-1896) 217; *Bhajan Das*, (1922) 24 Cr. L. J. 421.

2 *Bawaji*, (1872) Unrep. Cr. C. 63, Cr. R. of 1872; *Saberali Sarkar*, (1920) 21 Cr. L. J. 666.

3 *Fox*, (1879) 2 All. 522; *Ramdayal*, (1891) 5 C. P. L. R. 69.

4 *Randhir Singh*, (1881) 3 All. 597.

5 (1883) Weir, 3rd Edn., 196.

6 *Maung Po Nyan*, (1916) 17 Cr. L. J. 465.

or a joint, nor permanently deprives him of the use of a member or a joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet *cause intense pain, prolonged disease, lasting injury to the constitution* It is evidently desirable that the law should make a distinction between such a wound, and a scratch which is healed with a little sticking plaster A beating, again, *which does not maim the sufferer or break his bones, may be so cruel as to bring* him to the point of death Such a beating it is clear, ought not to be confounded with a bruise, which requires only to be bathed with vinegar, and of which the traces disappear in a day[1]

This section enumerates eight kinds of hurt as grievous The term "maim" in the English criminal law will include hurt

To make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in this section[2]

1. **'Emasculation'**.—The term 'emasculation' means the depriving of a person of masculine vigour, castration Injury to the scrotum would render a man impotent A person emasculating himself cannot be convicted under this section or under s 309[3] A person causing grievous hurt upon his own self does not come within the purview of this section

2. **'Disfiguration'**.—The word 'disfigure' in this section means to do a man some external injury which detracts from his personal appearance, but does not weaken him as the cutting off of a man's nose or ears[4] Where a girl's cheeks were branded with a red hot iron which left scars of a permanent character, it was held that the disfigurement contemplated by this section was caused[5]

3. **'Fracture or dislocation of a bone'**.—The fracture or dislocation of a bone is considered grievous because it causes great pain and suffering to the injured person The bone fractured may be rejoined or the bone dislocated may be re set, and this is immaterial so far as the offence is concerned

Where the accused threw his wife from a window about six feet high, but the fall was broken by a weather board fixed just below it and resulted in the fracture of the knee pan and in several small wounds, it was held that the offence committed was grievous hurt[6] Where the result of a joint attack by several persons on one party was fracture of the arm of the party assaulted, the offence committed was grievous hurt and not assault[7] The accused persons assaulted the deceased and though they had the latter entirely at their mercy inflicted only a severe beating breaking the bones of his arms and hands There was no evidence to prove that [illegible]
took place owing to toxic ab[illegible]
after the beating It was [illegible]
hurt[8].

4. **'Any hurt which endangers life'**.—These words cannot apply to cases in which life was not merely endangered but actually taken away[9]

5. **'Causes the sufferer to be, during the space of twenty days, in** [illegible]

[illegible]

during the space of twenty days It appears to us that the length of time during which a sufferer is in pain, diseased or incapacitated from pursuing his ordinary

1 [illegible] 151 152
2 [illegible]
3 [illegible]
4 [illegible]
5 *Anla bin Daloba*, (1863) 1 B. H. C. 101
6 [illegible]
7 [illegible]
8 [illegible]
9 [illegible] L. W.

avocations, though, a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety, be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pit-falls, the placing of ropes across a road... In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender"[1].

The Law Commissioners observe "We cannot but think that there is reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again an injury to the right hand may in the case of a clerk keep him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all. The proposed criterion is therefore unsatisfactory, but some criterion is necessary and it will be difficult to devise a better"[2].

The mere fact that a man has been in hospital for twenty days is not sufficient, it must be proved that during that time he was unable to follow his ordinary pursuits[3]. An injured man may be quite capable of following his ordinary pursuits long before twenty days are over, and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital, especially if he is fed at the public expense[4]. A disability for twenty days constitutes grievous hurt: if it continues for fifteen days, then the offence is hurt[5]. Where a man was so much injured that he had to go to hospital, but left it perfectly cured on the twentieth day, it was held that that day would count as one of the twenty days during which he was unable to follow his ordinary pursuits[6]. Where the accused caused hurt to a woman, who remained in a hospital only for seventeen days, out of which she was in danger for three days, it was held that he had caused grievous hurt[7].

Acts neither intended nor likely to cause death may amount to grievous hurt even though death is caused.—Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of grievous hurt if the injury caused is of a serious nature, but not of culpable homicide. The accused who was beaten by the deceased on the previous day came across the deceased by chance and gave him a blow on the back of the head with a hockey stick which he had in his hand at the time and ran away. The blow did not fell the deceased. It was held that the offence committed by the accused was grievous hurt because it would not be safe to hold that he intended to do more than cause grievous hurt[9]. Three men armed with sticks attacked an unarmed man and inflicted injuries which resulted shortly afterwards in his death. The accused intended to give a thrashing to the deceased but did not intend to cause death or to

1 Note M, pp. 152, 153.
2 First Rep., s. 374.
3 *Vasta Chela*, (1894) 19 Bom. 247; *Nga Ya Baw*, (1902) 1 L. B. R. 221.
4 *Vasta Chela, ibid.*
5 *Bishnooram Surma*, (1864) 1 W. R. (Cr.) 9.
6 *Sheikh Bahadur*, (1862) 2nd Mad. Sess.
7 *Bassoo Rannah*, (1865) 2 W. R. (Cr.) 29.
8 *Agra*, (1914) P. R. No. 37 of 1914; *Jahana*, (1916) P. L. R. No. 109 of 1916; *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 4 Bom. Cr. C. 157; *Jhandu*, (1924) 6 L. L. J. 268; *Datta Ram*, (1924) 1 Lah. C. 297, 6 L. L. J. 317; *Dalip Singh*, (1924) 7 L. L. J. 44.
9 *Ghulam Jilani*, (1925) 2 Lah. C. 37, 26 P. L. R. 430, 7 L. L. J. 573; *Mehr Shah*, (1927) 29 Cr. L. J. 24; *Khewna*, (1928) 30 Cr. L. J. 378.

cause such bodily injury as they knew was likely to cause death, it was held that they were guilty of an offence under s 326[1]

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two can be convicted under s 304 but both of them can be convicted of an offence under s 325[2] Where three persons attacked a fourth with clubs, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow, and there was no common intention to cause death or grievous hurt, it was held that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder[3] Where three accused persons assaulted the deceased, and gave him a beating in the course of which one of the accused struck the deceased a blow on the head, which resulted in death, it was held that, in the absence of proof that the accused had the common intention to inflict injury likely to cause death, they could not be convicted of murder[4] But if two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege that his individual act did not cause death and that by his individual act he cannot be held to have intended death[5] Where the accused could not have known that they were inflicting such injuries as would be likely to cause death, and the injuries were not directly responsible for the death, but death was caused by blood poisoning it was held that the accused was guilty under s 325 and not s 304[6]

The accused beat the deceased to death by *lathi* blows Individually none of the injuries was a fatal one and the deceased had died of the shock from multiple injuries which included a fracture of five ribs Upon the evidence on record it was not possible to attribute any particular injury to any individual assailant nor was it possible to say that any particular injury was the direct cause of his death It was held that it was not safe to convict the accused of an offence under s 302, and only a conviction under this section was possible[7] There was an exchange of words between the accused, seven in number, and the deceased The accused attacked the deceased with the intention of beating him The deceased received two incised trivial wounds and three contused wounds There was no medical evidence as to the cause of the death It was held that the accused could not be convicted of culpable homicide but were guilty under this section[8]

For further cases in which the act of the accused was held to be simple hurt, see Comment on s 319, p 769

Diseased spleen.—Where the accused pulling the deceased out of a cot, kicked him, and struck him on the side or on the ribs with a stick, whereby the deceased, whose spleen was diseased, died, it was held that he had committed the offence of voluntarily causing grievous hurt[9].

Blow aimed at one person falling upon another.—The accused struck a woman, carrying an infant in her arms, violently over her head and shoulders

1 *Ramna*, (1922) 6 L. L. J 533, *Bhure Khan* (1927) 2 Luck 433

2 *Agra* (1914) P R. No 37 of 1914, *Jahana*, [illegible] *Prasad Singh*, (1925) 26 Cr L J 1160, *Dal Singh*, (1926) 27 Cr L J 547

4 *Duma Baidya*, (1896) 19 Mad 483, *Dalip Singh*, (1924) 7 L. L. J 44

5 *Nga Po Sein*, (1902) 1 L. B R 233, *Jhamman*, (1920) 21 Cr L J 862

6 *Bhure Khan*, (1927) 2 Luck 433

[illegible]

One of the blows fell on the child's head, causing death. It was held that the accused committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt[1]. In the course of an affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death. It was held that the accused were guilty of causing grievous hurt[2]. In the course of an altercation between the accused and the complainant on a dark night, the former aimed a blow with his stick at the head of the latter. To ward off the blow, the complainant's wife, who had a child on her arm, intervened. The blow missed its aim, but fell on the head of the child causing severe injuries, from the effects of which it died. The accused was convicted of causing grievous hurt. It was held that, inasmuch as the blow, if it had reached the complainant, would have caused simple hurt, the accused was guilty of simple hurt only[3]. The accused attempted to enter a house in order to beat the owner of the house. The latter's wife, who was carrying her infant in her arms, tried to bar accused's passage by shutting the door. The accused forced open the door and aimed a blow with a club at her but it struck the child and killed it. It was too dark for the accused to have perceived that the woman was carrying a child. It was held that the accused could only be convicted of the offence of striking the woman and that inasmuch as the accused used a club and struck the blow with some force he intended to cause grievous hurt[4].

Death caused in the course of mutual stone-throwing is grievous hurt.—As the result of a longstanding enmity and after a fresh altercation, two parties encountered and hurled stones at each other. A member of one of the parties was struck by a stone of considerable weight and thrown with a good deal of violence, which ruptured his liver and immediately caused his death. As he fell down and lay on the ground, the accused, a man from the other party, caused a serious wound in his leg with a sword. It was held that the accused was not guilty of murder, as there could be no intention to kill, for the stone-throwing by his party was resorted to by way of defence to a similar act by the other party and the causing of death in stone-throwing was an unusual incident which could not be regarded as likely to result in injuries which caused death in the ordinary course of nature and that in causing the wound by a sword the accused was guilty of inflicting grievous hurt[5].

Presence of a person properly armed along with the accused.—D was killed by one blow on his head with a sharp weapon. It was found that the accused B and M with others armed with weapons had invaded the compound where D was sleeping, that they immediately assaulted D and that M struck him in the head and killed him. The intention of the accused was to insult and disgrace one Mussammat K. M was held guilty under s. 302; but as both the accused had armed themselves with deadly weapons B must have known that in case of opposition the weapons would be used and in all probability grievous hurt would be caused. He was, therefore, held guilty of abetment of an offence under this section read with s. 109[6].

Voluntarily causing hurt.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to

1 *Sahae Rae*, (1878) 3 Cal. 623; *Jageshar*, (1923) 24 Cr. L. J. 789.

2 *Kure*, (1918) 16 A. L. J. 615.

3 *Chatur Natka*, (1919) 21 Bom. L. R. 1101, 5 Bom. Cr. C. 152.

4 *Dyal Singh*, (1922) 24 Cr. L. J. 4.

5 *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 4 Bom. Cr. C. 157.

6 *Rahal Singh*, (1919) P. R. No. 24 of 1919.

any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

322 Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is *grievous hurt, and if the hurt* which he causes is grievous hurt is said "voluntarily to cause grievous hurt"

Voluntarily causing grievous hurt.

Explanation —A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends or knows himself to be likely to cause grievous hurt But he is said voluntarily to cause grievous hurt if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind

ILLUSTRATION.

A intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face but which causes Z to suffer severe bodily pain for the space of twenty days A has voluntarily caused grievous hurt

COMMENT.

The Law Commissioners observe The Judge is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur when he did what every body knows is likely to cause grievous hurt and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it then although grievous hurt may unexpectedly have ensued it would be his duty to convict the offender of simple hurt only judging that grievous hurt was not in his contemplation, for according to Clause 317 (this section) a person can be convicted of grievous hurt only when the result and the intention correspond or when grievous hurt has been suffered from an act which was intended to cause grievous hurt though it may be of a different kind [1]

[illegible]

tion [illegible]

consid [illegible]

been c [illegible] to be likely to cause grievous hurt If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under s 325[2]

323 Whoever, except in the case provided for by section 334, voluntarily causes hurt[1], shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both

Punishment for voluntarily causing hurt.

[1] First Rep., s 377

[2] Ngi Tun v. E (1914) 2 U. B. R. 23

COMMENT.

This is a general section for the punishment of voluntarily causing hurt. Sections 324, 327, 328, 329 and 330 deal with the same offence done under certain aggravated circumstances; and ss. 334, 336 and 337 provide for punishment when there are certain mitigating circumstances.

1. **'Voluntarily causes hurt'.**—See s. 321 as to the meaning of this expression.

Death of the complainant puts an end to the complaint.—The former Chief Court of the Punjab had held that an action under this section was a personal one and came to an end on complainant's death and the right to carry on the prosecution did not survive to the legal representatives of the deceased[1]. But the Lahore High Court has dissented from this view and has laid down that criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not terminate or abate merely by reason of the death of the complainant or the person injured. Section 306 of the Indian Succession Act, 1925, has no application to a criminal prosecution and there is nothing in the Criminal Procedure Code in support of the proposition that the death of the person injured or of the complainant, of itself causes the proceedings to abate. It is a mistake to speak of an offence as a purely personal one[2]. The Madras and Allahabad High Courts have also held that a criminal prosecution does not abate by reason of the death of the person injured[3]. The Madras High Court has laid down that where a complainant in a summons-case dies during the pendency of the case, the Magistrate should, under s. 247 of the Criminal Procedure Code, dismiss the complaint; it would be illegal for the Magistrate under the circumstances to grant an adjournment to enable the deceased complainant's son to come on the record and to proceed further with the enquiry[4].

PRACTICE.

Evidence.—Prove (1) that the accused by his act caused bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

The intent to cause hurt may be presumed from the nature of the hurt caused and the circumstances under which it was caused[5].

(3) That such hurt, etc., was caused without provocation.

Unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused, no conviction under this section and s. 325 can be arrived at on the ground of enmity and fight and serious injuries caused in the fight[6].

Autrefois acquit.—A person tried and acquitted on a charge of using criminal force under s. 352 (which includes the offence of battery) cannot be tried, in respect of the same criminal matter, on a charge of hurt[7].

Private defence.—In cases of hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence[8].

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

1 *Rama Nand*, (1917) P. R. No. 26 of 1917; *Labhu*, (1919) P. R. No. 25 of 1919.
2 *Hazara Singh*, (1920) 2 Lah. 27.
3 *Muhammad Ibrahim* v. *Shaik Dawood*, (1920) 44 Mad. 417; *Musa*, (1924) 22 A. L. J. 520.
4 *Appala Naidu*, (1927) 51 Mad. 339.
5 *Nga Ba Gyaw*, (1911) 1 U. B. R. 105.
6 *Dani*, (1920) 3 U. P. L. R. (L.) 11.
7 *Kaptan* v. *G. M. Smith*, (1871) 16 W. R. (Cr.) 3.
8 *Sohun*, (1865) 2 W. R. (Cr.) 59.

A conviction under s 160 on a prosecution initiated by the police would be no bar to a subsequent trial under this section on a complaint laid by the party injured[1]

Committal —Where death is caused, Magistrates should be careful not to take upon themselves to absolve defendants from the grave charges of murder or culpable homicide and convict for hurt or grievous hurt, unless it is quite clear that there is not sufficient evidence to justify a commitment[2]

Punishment.—The act for which an accused person must be punished is the hurt which he intended to cause, or might be reasonably held likely to cause, by the act done, and not an unfortunate and entirely unforeseen result of that act[3] Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose separate and accumulative sentences[4]

Direction to Magistrates.—The Lahore Rules —It has come to notice that Magistrates are apt to confound ss 352 and 323 of the Indian Penal Code, and to issue process and convict under the former section in cases in which the complaint is laid under s 323, and the evidence for the prosecution establishes the fact

2

are trial

warrant-case The procedure in the former class of case is, no doubt, easier to the Magistrate, but it is less favourable to the accused, for in warrant cases the Magistrate is bound to call upon the accused for his defence, unless he discharges him (see ss 253 to 256 of the Code of Criminal Procedure), while in a summons case the accused is primarily responsible for the production of his evidence on the day fixed for hearing (s 244)

3 It is accordingly pointed out that s 352 of the Indian Penal Code does not apply to cases where the offender uses criminal force which actually causes hurt to the person against whom it is displayed, and that such cases fall under s 323 of the Indian Penal Code

4 It has been ruled that s 304A is inapplicable to cases in which an assault, however petty, is deliberately made, and death ensues Such cases fall either under s 302, s 304, or s 335, s 325, or s 323[5]

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, voluntarily caused hurt to AB, and thereby committed an offence punishable under s 323 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Voluntarily causing hurt by dangerous weapons or means

324 Whoever, except in the case provided for by section 334, voluntarily[1] causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument, which, used as a weapon[2] of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison[3] or any corrosive substance[4], or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the

[1] *Ram Sukh* (1924) 47 All 284
[2] (1869) 12 W R (Cr Cir) 7
[3] *Kelly* (1897) P R No 11 of 1897
[4] *Baleshar*, (1915) 37 All 628
[5] L H C R & O, Vol II Ch XXXI p 125

blood, or by means of any animal[5], shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Object.—The object of the section is to make simple hurt more grave and liable to a more severe punishment where it has the 'differentia' of one of the modes of infliction described in the section[1].

The authors of the Code say: "Bodily hurt may be inflicted by means of the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts which would not, according to our classification, be designated as grievous, ought yet, on account of the mode in which they are inflicted, to be punished more severely than many grievous hurts"[2].

1. **'Voluntarily'.**—See s. 39, *supra*.

2. **'Weapon'.**—It is not necessary that the manner of use of the weapon must be such as is likely to cause death. Such an element would compose a crime of a wholly different character[3]. It is merely the nature of the instrument that should be taken into consideration[4]. Where the accused fired a loaded pistol into a group of persons among whom was A, without aiming at A or anyone in particular, but intending generally to do grievous bodily harm, and wounded A, it was held that he had committed this offence[5].

3. **'Poison'.**—Poison is "that which when administered is injurious to health or life"[6]. "If the thing administered is a recognized poison, the offence may be committed, though the quantity given is so small as to be incapable of doing harm"[7]. A person who administers that which is a poison is guilty, although by ignorance or mistake he happens to administer it in a form which renders it innocuous. Where, therefore, the accused, with intent to kill, administered to a child nine weeks old two poisonous berries but the child did not die because the poisonous property of berries resided in the kernel which was enclosed in a pod so hard that it could not be digested by a child of that age, it was held that he was guilty of the offence of administering poison with intent to kill[8]. Under the Code this will amount to attempt to murder.

4. **'Corrosive substance'.**—The term "corrosive substance" means any substance which irritates the system, e.g., sulphuric acid, corrosive sublimate, etc.

5. **'Animal'.**—See s. 47, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused by his act bodily pain disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

(3) That it was unprovoked.

1 (1872) 7 M. H. C. App. 11.
2 Note M, pp. 153, 154.
3 (1872) 7 M. H. C. App. 11.
4 *Nga Po Thit*, (1899) 1 U. B. R. (1897) 1901) 311.
5 *Fretwell*, (1864) 9 Cox 471.
6 Per Lord Coleridge, C. J., in *Cramp*, (1880) 5 Q. B. D. 307, 309.
7 Per Field, J., in *ibid*, pp. 309, 310.
8 *Richard Clauderay*, (1850) 4 Cox 84.

(4) That the accused caused it by means of an instrument for shooting, stabbing or cutting, or by an instrument, used as a weapon likely to cause death; or by means of fire, etc ; or by means of any poison, etc , or by means of any substance which it is deleterious to the human body to inhale, etc , or by means of any animal

[illegible] when per [illegible] —Triable by [illegible] econd class

Alternative charges.—Where the accused were charged under s 148 of the Indian Penal Code of rioting armed with deadly weapons, and also under s 324 of voluntarily causing hurt by dangerous weapons, it was held that they should have been sentenced only under one or other of these sections, the charges being properly speaking, only alternative charges[1]

Punishment: Lower Burma Rule.—Deterrent sentences must be passed in cases in which hurt is caused by a knife or other deadly weapon[2]

See the Frontier Crimes Regulation[3], ss 6, 11 (3) (*d*) and 12 (2), and the Criminal Tribes Act[4], s 64

***Charge.**—The charge and finding need not contain a negation that the hurt* was caused on grave and sudden provocation[5] The charge should state that the weapon used was one of the kinds mentioned in this section[6] Merely describing it as a 'dangerous weapon' is not sufficient[7]

The charge should run as follows —

I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about t [illegible] hurt to XY by means of—— and thereby committed an o [illegible] Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* High Court)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt[1], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for voluntarily causing grievous hurt

COMMENT.

1. **'Voluntarily causes grievous hurt'.**—See s 322 as to the meaning of this expression

PRACTICE

Evidence.—Prove (1) that the accused caused [illegible] of the kinds described in s 320[1]

(2) That the accused intended, or knew that he was likely, to cause grievous hurt of any kind so described

(3) That the accused did so voluntarily[2].

[1] *Dina Sheikh* (1868) 10 W. R (Cr) 63.
[2] L. B. C M , Vol I, s. 327, p 89.
[3] Reg III of 1901.
[4] Act II of 1897
[5] (1872) 7 M. H. C. App. 5.
[6] (1865) 3 W. R (Cr L)15.
[7] [illegible]
[1] [illegible]
[2] [illegible]

In cases of hurt, it is the duty of the Magistrate to come to a finding of his own as to whether the hurt was grievous or simple, and for this purpose to examine the medical officer to ascertain whether the injuries are of any of the kinds specified in s. 320. It is not the business of the medical officer to classify a hurt as grievous or simple, but to describe facts, from which the Magistrate will decide whether the hurt is grievous or not[1].

It is not necessary to prove that the accused struck the complainant so severely as to endanger the latter's life[2]. But a violent blow inflicted upon the body would indicate an intention of causing grievous hurt[3].

Private defence.—In cases of grievous hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence[4]; and it would lie on the accused to show that he did not exceed that right[5].

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Committal.—Where death is undoubtedly caused by the prisoner's violence, the Magistrate is bound to send the case to the Sessions Court[6].

Charge.—The charge should state that the hurt was caused 'voluntarily', and not 'willingly'[7].

The charge should run as follows:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily caused grievous hurt to——, and thereby committed an offence punishable under s. 325 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[8].

Punishment.—A sentence of fine only is not legal. See the Burma Laws Act, 1898, s. 4 (3), cl. (*b*), as to punishment to be inflicted by Courts in Burma.

Voluntarily causing grievous hurt by dangerous weapons or means.

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

1 *Po Maung,* (1906) 3 L. B. R. 196.
2 *Purmanund Dhulia,* (1872) 18 W. R. (Cr.) 22.
3 *Narayan Pasi,* (1875) 24 W. R. (Cr.) 24.
4 *Sabun,* (1865) 2 W. R. (Cr.) 59.
5 *Asiruddin Ahmed,* (1904) 8 C. W. N. 714.
6 *Narayan Pasi,* Sup.
7 (1865) 2 W. R. (Cr. L.) 20.
8 Criminal Procedure Code, Sch. V, xxviii,

COMMENT

This section applies only to the person who does a substantive act himself, [illegible] the Code[1] Where [illegible] was no proof that B [illegible] that A knew in any [illegible] that A could not be convicted of abetting an offence under this section but only of abetting an assault[2] Where the injury attributable to the blow caused by an accused was not serious and grievous hurt was caused as the result of the cumulative injuries inflicted by all the assailants, it was held that the accused could not be held guilty under this section[3]

The relationship between this section and the preceding one is the same as that between s 324 and 323 Where several accused struck the deceased blows one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under this section and not under s 302[4]

PRACTICE.

Evidence —Prove (1) the causing of grievous hurt by the accused[5]

(2) That it was caused voluntarily[6]

(3) That the accused received no provocation for the same

(4) That such grievous hurt was caused by means of an instrument for shooting etc, or by means of any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire, etc or by means of any poison, etc, or by means of any substance which it is deleterious to the human body to inhale etc, or by means of any animal

Procedure.—Cognizable—Summons—Not bailable—Not compoundable—Triable by Court of Session Presidency Magistrate or Magistrate of the first class

Charge under ss 326 and 149, but conviction under s 326 alone —A full bench of the Madras High Court has held, differing from the Calcutta High Court that when a charge has been framed under ss 326 and 149, a conviction under s 326 is not necessarily bad Whether the conviction is bad or not depends upon whether the accused has or has not been materially prejudiced by the form of the charge[7]

Evidence of a medical man is necessary —In all cases of voluntarily causing grievous hurt the evidence of the medical officer who examined and attended on the person to whom the hurt was caused should, if obtainable without unreasonable expense or delay, invariably be taken[8]

Committal and punishment.—The accused was tried by a Presidency Magistrate on a charge of [illegible] the whole of the [illegible] to rigorous impr[illegible] and sentence, held that the offence of which the accused was convicted being one punishable with transportation for life, or rigorous imprisonment for ten years the Magistrate ought to have committed the accused for trial to the High Court

1 *Ram Sarup Pai* (1901) 6 C. W. N 98
2 *Tha Myit* (1908) 4 L. B. R. 271
3 *Sanna Lalli* (1908) 20 Cr. L. J 167
4 *Gourdas Namasudra* (1908) 36 Cal 659
5 *Vide* s 325 *sup*
6 *Khudiram Das* (1906) 12 C. W. N. 530
7 *Theethumalai Gounder*, (1921) 47 Mad 746, F. B. See *Ebrahim Das* (19[illegible]) [illegible] where the accused were charged and [illegible] by a Magistrate under ss. 326 and 149 [illegible] appeal the conviction was altered to one under ss. 326 and 34.
8 *Nga Chit* (1884) S. J. L. B. [illegible]

The case was afterwards committed to the Court of Session and the accused was sentenced to eight years' rigorous imprisonment[1]. The amount of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether at the instant, or long after the husband found himself dishonoured[2]. See the Burma Laws Act, 1898, s. 1.

Lower Burma Rule.—The attention of Magistrates is called to the necessity of passing really *deterrent sentences in cases in which hurt is caused by a knife* or other deadly weapon. The use of knives on the slightest provocation, and often *without any provocation at all, is far too frequent in this province.* The most likely method of suppressing this dangerous practice is to make the punishment severe and certain. Many cases of this kind have come to the notice of the Judges in which inadequate sentences have been passed[3].

Where an accused is sent up for trial under s. 326, Indian Penal Code, for causing grievous hurt with a deadly weapon, a reference should always be made to the District Magistrate, in order that he may, if he thinks fit, try the case in exercise of his special powers. Many cases of this kind are hardly distinguishable *from attempts to murder,* punishable under s. 307 of the Penal Code, and Magis*trates, other than the District Magistrate, can rarely impose a sufficiently severe* sentence in these cases[4].

Charge.—See the remarks under the heading 'Charge' in s. 324, *supra.*

Voluntarily causing hurt to extort property, or to constrain to an illegal act.

327. Whoever voluntarily[1] causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer[2], any property or valuable security[3], or of constraining[4] the sufferer or any person interested in such sufferer to do anything which is illegal[5] or which may facilitate the commission of an offence[6], shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section applies not only in cases of execrable cruelties which are committed by robbers, dacoits, etc., for the purpose of extorting property, or information relating to property, but to all cases in which the hurt is caused for the purpose of extorting, or compelling, against the sufferer's consent, the delivery of property, *notwithstanding* that the offender may have a valid claim or title to such property.

1. **'Voluntarily'.**—See s. 39, *supra.*

2. **'Person interested in the sufferer'.**—Any tie of blood *relationship,* marriage service, or even friendship, seems sufficient. The Court must ascertain for what purpose the suffering was caused, whether it was directed wholly at the sufferer or at another through him[5].

3. **'Valuable security'.**—See s. 30, *supra.*

4. **'Constraining'.**—This word seems to have been inserted with a view to make this section applicable to all cases where, if 'extortion' could not be proved, a compelling or constraining against the sufferer's consent would equally be an offence.

1 *Abdul Rahiman,* (1891) 16 Bom. 580.
2 *Sulamat Russooa,* (1865) 4 W. R. (Cr.) 17; *Bhagwan Chhagan,* (1914) 17 Bom. L. R. 63, 3 Bom. Cr. C. 1.
3 L. B. C. M., Vol. 1, s. 327, p. 89.
4 *Ibid,* s. 328, p. 89.
5 M. & M. 294.

5 **'Illegal'.**—See s 44, *supra*

6. **'Offence'.**—The word 'offence' here denotes a thing punishable under this Code or under any special or local law (s 40)

PRACTICE.

Evidence—Prove (1) that the accused caused hurt[1]

(2) That the accused caused such hurt in order to extort from the sufferer, or person interested in him, some property or valuable security, or

that the accused caused such hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence

Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session—Presidency Magistrate or Magistrate of the first class

Charge—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, voluntarily caused hurt to AB for the purpose of extorting from the said AB [*or* from a certain person interested in the said AB], to wit——, a certain property, to wit——, and thereby committed an offence punishable under s 327 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

Punishment—See the Criminal Tribes Act (II of 1897), s 6, and the Burma Laws Act, 1898, s 4

328 Whoever administers to or causes to be taken by[1] any person[2] any poison or any stupefying, intoxicating or unwholesome drug, or other thing[3] with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence[4] or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Causing hurt by means of poison, etc with intent to commit an offence

COMMENT.

This section is merely an extension of the provisons of s 324 Under s. 324 *actual causing of hurt is essential*

The offence under this section is complete even if no hurt is caused to the person to whom the poison or any other stupefying, intoxicating, or unwholesome drug is administered

1. **'Administers to or causes to be taken by'.**—The word 'administers' and the expression 'causes to be taken' are used to include every possible case of taking an unwholesome drug Mere procuring or supplying a poisonous drug at the instigation of a person who wishes to take it does not amount to the offence of administering it[1] At the same time to constitute administering, it is not necessary that the poison should be delivered by the hand of the party[2] If a servant put poison into a coffee-pot which contains coffee, and, when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her breakfast, and the mistress drinks the poisoned coffee, this will amount to 'administering' poison

[1] *Vide*, s. 323 sup L. J (M C.) 145

[2] *Francis Fretwell*, (1862) L. & C. 161, 31

[3] *Hannah Harley*, (1830) 4 C & P [illegible]

Putting poison in a place where it is likely to be found and taken is an attempt to administer. Where the accused purchased some "salts of sorrel" and put it in the complainant's sugar basin, mixing it with sugar, and the complainant subsequently put some of the mixture into his tea, but on tasting it discovered that there was something wrong, and on investigation poison was discovered, it was held that this constituted an attempt to administer poison[1].

One E being pregnant applied to the accused to get her something to procure miscarriage, and that the accused procured a drug and gave it to the deceased. The drug was taken by E but not in the presence of the accused, and it procured miscarriage. It was held that the accused was guilty of administering and causing to be taken certain poison with intent to procure miscarriage[2].

Where a deleterious drug is administered, an offence is committed under this section although life is not endangered[3]. Thus, where a man administered the juice of some leaves to some villagers by way of ordeal and some of them showed symptoms of poison[4]; and where the accused administered powder of *dhatura* to a woman and robbed her of her jewellery while she was senseless[5], this offence was held to have been committed. Where, for the purpose of facilitating robbery, *dhatura* was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was held that, in respect of the traveller who died, the offence committed was that punishable under s. 325, and, in respect of the travellers who did not die, the offence committed was that under this section[6]. But in a subsequent case the same High Court, where *dhatura* was administered with the object of facilitating robbery in such quantity that the person to whom it was given died in the course of a few hours, convicted the accused of murder under s. 302[7]. The Bombay High Court has held likewise[8].

As *dhatura* can both be and is in practice frequently used by robbers without fatal results, it is necessary to show against a person accused of a purpose to commit robbery with murder something more than that he proposed to administer, or did on a particular occasion administer, *dhatura* in order to effect his purpose of robbery, though it may not be absolutely necessary to show that on any occasion culpable homicide amounting to murder was in fact committed[9].

Where the accused administered a drug to a female to excite her sexual passion and desire, in order that he may have sexual connection with her, it was held that he had administered an unwholesome drug[10].

2. **'Any person'.**—It is not necessary that the hurt should be caused to any particular person intended, or that the person injured or likely to be injured should have been previously known. Where the accused mixed milk bush juice in his toddy pots, knowing that if drunk by a person it would cause injury, with the intention of detecting an unknown thief who was always in the habit of stealing his toddy, and the toddy was drunk by some soldiers, who purchased it from an unknown vendor, it was held that he was guilty under this section[11].

3. **'Or other thing'.**—These words must be referred to the preceding words and be taken to mean "unwholesome or other thing" and not other things simply[12].

4. **'With intent to cause hurt...or to facilitate the commission of an offence'.**—The word 'offence' here denotes a thing punishable under this Code or under any special or local law (s. 40). If the poison or unwholesome drug is administered not with the intention of causing hurt or to commit an offence,

1 *Dale*, (1852) 6 Cox 14.
2 *Harriett Wilson*, (1859) D. & B. 127; *Mary Farrow*, (1857) D. & B. 164.
3 *Joygopal*, (1865) 4 W. R. (Cr.) 4.
4 *Dasi Pitchigadu*, (1883) 1 Weir 355.
5 *Nanjundappa*, Weir, 3rd Edn., 197.
6 *Bhagwan Din*, (1908) 30 All. 568.
7 *Gutali*; (1908) 31 All. 148; *Gauri Shankar*, (1918) 40 All. 360; *Nanhu*, (1923) 45 All. 557.
8 *Shetya Timma Waddar*, (1926) 28 Bom. L. R. 1003, 8 Bom. Cr. C. 322.
9 *Pira*, (1881) P. R. No. 28 of 1881.
10 *Wilkins*, (1861) 31 L. J. (M. C.) 72, 9 Cox 20.
11 *Dhania Daji*, (1868) 5 B. H. C. (Cr. C.) 59.
12 *Jotee Ghoraee*, (1864) 1 W. R. (Cr.) 7.

the accused cannot be convicted under this section Accused, a boy of sixteen [illegible] hirteen, persuaded another [illegible] containing *dhatura*, which [illegible] re Evidently there was no intention on accused's part to cause hurt to any person, but, as a result of the administration of the drug, the girl was thrown into a delirium for some time with the possible risk of falling into a coma It was held that the offence did not fall within this section but the accused must be deemed to have had knowledge that the administering of the drug was likely to cause hurt within the meaning of s 319[1]

PRACTICE.

Evidence.—Prove (1) that the substance in question is a poison, or any stupefying, intoxicating, or unwholesome drug, etc

(2) That the accused administered or caused the complainant to take such substance

(3) That he did as above with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or that the accused intended to commit or facilitate the commission of an offence

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Oudh rule.—Sessions Judges and Magistrates will, however, bear in mind that a sentence of transportation for life cannot be inflicted under s 328, Indian Penal Code, even on a second or third conviction, because s 75 does not apply to offences punishable under Chapter XVI, Indian Penal Code, in which s 328 is placed If, however, the offender not only causes, or attempts to cause, hurt by poisoning, in order to commit theft but afterwards commits theft on his victim, thus completing the offence of robbery, he may be dealt with under Chapter XVII, ss 392 and 394, and in that case may be transported for life under ss 392, 75, s 394, or ss 394, 75, Indian Penal Code, if he be convicted by the Court of Session, not by the Deputy Commissioner[2]

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, administered to (*or* caused to be taken by) AB a certain poison (*or* a certain stupefying, intoxicating *or* unwholesome drug), to wit——, with intent to cause, (*or* knowing it to be likely that you will thereby cause) hurt to the said AB (*or* with intent to commit or facilitate the commission of the offence of——upon the said AB), and thereby committed an offence punishable under s 328 of the Indian Penal Code and within [illegible]

[illegible]

Regulation, 1901, ss 11 (3) (*d*) and 12 (2)

329 Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with transpor-

Voluntarily causing grievous hurt to extort property or to constrain to an illegal act

[1] *Amir Beg*, (1923) 45 All 77

[2] O. C. D., s. 64.

tation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

See Comment on s. 327, *supra*. This section is similar to that section, the only difference being that the hurt caused under it is grievous.

PRACTICE.

Evidence.—Prove (1) that the accused caused grievous hurt[1].

(2) That the accused caused such grievous hurt in order to extort from the sufferer, or a person interested in him, some property or valuable security; or that the accused caused such grievous hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should be in the same form as that under s. 327, except that the expression 'grievous hurt' should be substituted for 'hurt'.

Voluntarily causing hurt to extort confession, or to compel restoration of property.

330. Whoever voluntarily[1] causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer[2] any confession or any information which may lead to the detection of an offence[3] or misconduct, or for the purpose of constraining[4] the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security[5] or to satisfy any claim or demand[6], or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(*b*) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(*c*) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(*d*) A, a zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

COMMENT.

The offence which this section intends to describe is that of inducing a person by hurt to make a statement, or a confession, having reference to an offence or misconduct; and whether that offence or misconduct has been committed is wholly immaterial[2]. The principal object of this section is to prevent torture by the police. But the section covers every kind of torture for whatever purpose it may be intended.

1 *Vide*, s. 325, sup.
2 *Nim Chand Mookerji*, (1873) 20 W. R.

The information sought for may be required for the advancement of justice—nay more, it may be such information as cannot be withheld without offending against public justice—the property, the extortion of which is sought, may be property which the sufferer has borrowed from the offender and which he illegally refuses to give back—the claim or demand may be a just claim—but the law will not tolerate the employment of such means as are here made punishable, even when for an honest end[1]

1. **'Voluntarily'** —See s 39, *supra*

2 **'Person interested in the sufferer'.**—See s 327, *supra*

3 **'Offence'.**—It must be proved that the hurt to the complainant was caused with intent to extort a confession of some offence or misconduct punishable under the Code The accused seized three women, took them to the house of one of them, and there tortured the women by pouring hot oil over them and other wise ill treating them One of these women subsequently threw herself down a well and died It was alleged that cholera was prevalent in the village and that ised witchcraft, tortured them for the were witches It was held that the this section, but they were guilty of hurt[2]

Police-torture —Where the accused, a constable, during an enquiry into a theft case, violently beat the deceased who died about nine days afterwards from the effects of the beating it was held that he was guilty under this section[3] Under similar circumstances when death resulted from injuries which were of the nature of grievous hurt the accused was convicted under the next section[4]

The word 'offence here denotes a thing punishable under this Code, or under any special or local law (s 40)

4. **'Constraining'.**—See s 327, *supra*

5 **'Valuable security'** —See s 30, *supra*

6 **'Demand'.**—Under this section the 'demand must be one with respect to property Hence, where the accused, in order to constrain his wife to return to his house, caused hurt to her, s 324, and not this section, was held to apply[5]

Abetment.—Where the accused stood by and acquiesced in an assault on a prisoner committed by another police man for the purpose of extorting a confession it was held that he had committed abetment of the offence under this section[6]

PRACTICE.

Evidence —Prove (1) that the accused caused hurt[7]

(2) That the accused caused such hurt in order to extort from the sufferer, or a person interested in him a confession, or some information[8]

(3) That such confession or information was required, as possibly leading to the detection of an offence, or of some misconduct

Or prove—

(1) As above

(2) That the accused caused such hurt in order to constrain the sufferer or a person interested in him to restore or to cause the restoration of some property or valuable security, etc

[1] M & M 237

[2] *Baboo Mo[illegible]* (1870) 13 W P (Cr) 23.

[3] *Merah Mahomed* (1868) P R. No 60 of 1866. See *Mehter Ali* (1885) 11 Cal 630

[4] *Miran Bakhsh* (1916) P W R No. 12 of 1917

[5] *[illegible]* (18[illegible]) 11 Mad. 2[illegible], *[illegible] Bakhsh* (192[illegible]) 5 L L J 3[illegible].

[6] *In re [illegible]* (19[illegible]) 20 Bom. 394.

[7] *Vide*, s [illegible]

[8] *[illegible]* (1870) 13 W. R. [illegible]

There must be immediate connection between the assault and the restoration of property. The intention of the person causing the assault must be proved to be to obtain from the person assaulted a confession of the restoration of property[1].

Procedure.—*Cognizable—Warrant—Bailable*—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That *you, on about the*——*day of*——, *at*——, voluntarily caused hurt to AB for the purpose of extorting from the said AB (*or* from a certain person interested in the said AB, to wit—) a certain confession (*or* information) to wit——, which might lead to the detection of the offence of —(*specify the person in respect of whom, and the place where, the offence was committed*), and thereby committed an offence punishable under s. 330 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Voluntarily causing grievous hurt to extort confession or to compel restoration of property.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

See Comment on the preceding section. This section is similar to the preceding section except that the hurt caused under it should be 'grievous'.

PRACTICE.

Evidence.—Prove the same points as those required for s. 330, showing that the hurt caused was grievous hurt[2].

Procedure.—Cognizable—Warrant—Not *bailable—Not compoundable*—Triable by Court of Session.

Charge.—See s. 330. In the charge as given under that section *substitute* 'grievous hurt' for 'hurt'.

Voluntarily causing hurt to deter public servant from his duty.

332. Whoever voluntarily[1] causes hurt to any person being a public servant[2] in the discharge of his duty as such public servant[3], or with *intent to* prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of

[1] *Satya Deva Swami*, (1918) 5 P. L. W. 109. [2] *Vide*, s. 325, sup.

his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The protection given by this section is not confined to public servants, but will also extend to persons acting in good faith under their directions The public ... servant If he ... urt to the public servant · under s 353 there is assault or criminal force for the same purpose.

1. **'Voluntarily'.**—See s. 39, *supra.*

2. **'Public servant'.**—See s 21, *supra*

3. **'In the discharge of his duty as such public servant'.**—This expression means in the discharge of a duty imposed by law on such public servant in the particular case, and does not cover an act done by him in good faith under colour of his office[2] "A warrant", for example, "is handed to a police-officer for the arrest of a particular person That warrant, on the face of it, does not direct him to break open premises, for instance, in order to effect the arrest, and yet it may be necessary for the officer in discharge of his duty in arresting the accused under the warrant to break into the accused s house, or to do some other act without the doing of which the warrant could not be executed Such acts would be properly described as done or attempted to be done by the police officer in the lawful discharge of his duty If it was unnecessary to do such an act, and yet it was done, the act would not be done b ... duty, and therefore would not be

A warrant was issued by a ... Criminal Procedure Code The warrant was sent to a *thana* to be executed It was there, after being copied into a book kept for that purpose at the *thana*, made over to a particular constable for execution When the constable to whom the warrant had been made over had left the *thana*, it was discovered that D was in a ... companions arrested D , but, as they were returning with him in custody, some of D's friends, aided by D himself, attacked them, rescued D, and caused hurt to the police It was held that the police-officers concerned in arresting D under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of this section so as to render the accused liable to conviction under it , but inasmuch as they were acting in good faith under colour of their office, s 99 applied, and D and his associates might properly be convicted under ss 147 and 323[4] An Excise Inspector, in searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He ... ore ... ouse ... con- ... the ... ar

[1] *Hardit Singh*, (1911) P L. R No 161 of 1911

[2] *Dalip*, (1896) 18 All 246 , *Madho*, (1917) 40 All 22

[3] Per Edge C. J , in *Dalip*, (ibid) pp 250, 251

[4] *Dalip*, (1896) 18 All 246. *Nand Kishore* (1891) 12 A. W N 1, though overruled by this case, yet it have laid down bad law

offence punishable under s. 323[1]. Where a person is arrested for an offence not really under a warrant, the mere fact that a warrant had been issued for his arrest, which warrant had been executed against other persons who have since been convicted, can hardly be put forward as a justification for the arrest[2]. Where an order issued by a Magistrate ceased to have effect, a constable in carrying out the order could not be said to have been acting in the discharge of a duty imposed by law on him, and no conviction could take place under this section[3]. If hurt is caused the accused may be convicted under s. 323. Playing cards in a street is no offence under s. 34 of the Police Act and a constable prohibiting people from playing cards in a street is not acting in discharge of his duty. Players assaulting the constable are not guilty of an offence under this section but under s. 323[4].

A police constable investigating a charge of burglary under s. 457 is empowered, under s. 54 of the Criminal Procedure Code, to arrest, without an order from a Magistrate or his superior officer, persons against whom a reasonable suspicion of having been concerned in the burglary exists, and if any of such persons resists the wish of the constable by force he is guilty of an offence under this section, if he causes hurt: or under s. 353, if an assault is simply committed and he is not protected under s. 99. But in the case of a scuffle merely a small fine is quite sufficient to meet the ends of justice[5]. A police-officer authorized to investigate a charge of theft has a right to make a search, which is incidental to his right to investigate. In conducting the search, however, if he ignores the provisions of s. 103 of the Criminal Procedure Code and the accused offer resistance they are guilty of an offence under this section for the officer so resisted would not be at the time acting in the discharge of his duty[6]. While a very evenly contested wrestling match was going on, one of the constables, who had been invited by the organizers of the show to keep peace and order and who was a backer of one of the contestants, interfered with the wrestling with the result that a scuffle followed in which some of the policemen were hustled by the accused and their uniform torn, it was held that it was very difficult to resist rushing the arena when a constable who was also a backer was interfering, but that, however, would not justify the action of the accused[7].

A police-officer helping another outside his own jurisdiction but in the same district shall be deemed to be doing his duty as a public servant, and a person obstructing such officer is punishable under this section, because under s. 11, sch. B, of the Bombay District Police Act 1890, police-officers of every grade are appointed to the entire district in which they have to serve, and under s. 32 of the Act a police-officer shall be deemed to be always on duty in the area to which he is appointed[8].

Blow with an umbrella amounts to 'hurt'.—Where a blow was struck by the accused with an umbrella to a public servant it was held that this offence was committed[9].

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt[10].

(2) That the person so hurt was a public servant.

(3) That such public servant was then discharging his duty as such[11].

Or prove,

1 *Mukhtar Ahmad*, (1915) 37 All. 353; *Mir Shah Nawaz Khan*, (1913) 8 S. L. R. 1.
2 *Abdool Karim*, (1905) 4 C. L. J. 92. See *Chunder Coomar Sen*, (1899) 3 C. W. N. 605.
3 *Madho*, (1917) 40 All. 28.
4 *Mulchand*, (1925) 27 P. L. R. 74.
5 *Yusuf*, (1910) P. R. No. 18 of 1910. See *Mahomed Yakoob*, (1910) 7 M. L. T. 386.
6 *Nirmal Singh*, (1919) 17 A. L. J. 1047.
7 *Miran*, (1925) 23 A. L. J. 1027.
8 *Khairo*, (1924) 18 S. L. R. 221.
9 *Sheo Gholam Lalla*, (1875) 24 W. R. (Cr.) 67.
10 *Vide* s. 323, sup.
11 *Sampat*, (1917) 15 A. L. J. 565: *Ranjha Mal*, (1927) 9 L. L. J. 424.

(1) and (2) as above, and further

(3) That the accused did so, with intent to prevent or deter such public servant or any other public servant, from discharging his duty[1], or

that he did so in consequence of something done, or attempted to be done, by such public servant, in the lawful discharge of his duty

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, voluntarily caused hurt to one AB a public servant, in the discharge of his duty as such public servant, and thereby committed an offence punishable under s 332 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Punishment —See the Criminal Tribes Act (II of 1897) s 6

Voluntarily causing grievous hurt to deter public servant from his duty

333 Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

COMMENT

This section provides for the aggravated form of the offence dealt with in the last The hurt caused under it must be grievous

See Comment on the preceding section

Public servant must be acting in the discharge of his legal duties.—Two village watchmen arrested one F on suspicion that he was in possession of stolen property While he was being taken to the police station he was rescued from the custody of the watchmen by certain persons It was held that the watchmen were not members of the police force, and had no authority to arrest F on mere suspicion inasmuch as the statute whereunder they had been appointed was repealed, and that F could not be convicted under this section because it was necessary to make out that F and the actual rescuers were acting in pursuance of a common intention within the meaning of s 34[2]

PRACTICE

Evidence.—Prove the same points as those for s 332, showing that the hurt caused was grievous hurt[3]

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge —See s 332

Punishment —See the Criminal Tribes Act (II of 1897), s 6, the Burma Laws Act (1898), s 4

[1] *Kuhen Lal* (1924) 22 A L J 501
[2] *Jafar*, (1916) 14 A L J 789
[3] *Vide* s 325 sup

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation[1], if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term, which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

This section serves as a proviso to ss. 323 and 324.

Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under this section, and not under s. 324[1].

1. 'Grave and sudden provocation'.—See Comment on s. 300, exception 1.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.

(2) That it was caused when he was under grave and sudden provocation.

(3) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The burden of proving a sudden provocation, and that the accused neither intended nor knew that he was likely to cause hurt to any person other than the person giving the provocation, would lie on the accused.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Voluntarily causing grievous hurt on provocation.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation[1], if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as exception 1, section 300.

COMMENT.

This section serves as a proviso to ss. 325 and 326.

1. 'Grave and sudden provocation'.—See Comment on s. 300, exception 1. The provocation and its effects must be sudden as well as grave; and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation[2]. If the particular act of which the accused is found guilty is one which imports deliberate design, the plea of grave and sudden provocation has not the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be. Thus, where the accused cut the nose of his wife with deliberate

[1] *Bhala Chula*, (1863) 1 B. H. C. 17.

[2] *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35.

design, the High Court enhanced the sentence to two years rigorous imprisonment though there was grave provocation[1]

'Sudden provocation' —A person who, by a single blow with a deadly weapon, killed another, entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her, was held guilty of causing grievous hurt on a grave and sudden provocation[2]

Not sudden provocation —A husband, suspecting his wife of infidelity, hid himself so as to see her with her paramour, and having seen an improper act being committed he came out and caused grievous hurt to the wife It was held that assuming the provocation to be grave it was not 'sudden' within the meaning of this section[3]

Amendment —The word voluntarily was inserted by Act VIII of 1882, s 8 As to the meaning of this word see s 39 *supra*

PRACTICE

Evidence —Prove (1) that the accused caused bodily pain, disease, or infirmity

(2) That he did so with the intention or knowledge of causing grievous hurt

(3) That it was caused when he was under grave and sudden provocation

(4) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation

Onus —The onus of proving sudden provocation, etc, would, as in s 334 lie on the accused

[illegible] r [illegible] by [illegible]

Charge —I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, voluntarily caused grievous hurt to XY on grave and sudden provocation given to you by the said XY [(or [illegible] to you by [illegible] by) cause [illegible] of the Indian Penal Code and within my cognizance (or the cognizance of the Court of Session *or* High Court)

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

336 Whoever does any act[1] so rashly or negligently[2] as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both

Act endangering life or personal safety of others

COMMENT

Rash and negligent acts, which endanger human life or the personal safety of others are punishable under this section even though no harm follows They are additionally punishable under ss 337 and 338 if they cause hurt or grievous hurt

[1] *Bhagwan Chhagan* (1914) 17 Bom. L. R. (Cr) 55
[illegible] 68, 3 B m Cr C. 1
[2] *Chelunlee Poramanel* (1865) 3 W R.
[3] *Romani* (1889) 9 A W N 9

Many specific acts of rashness or negligence likely to endanger life or to cause hurt or injury are made punishable by Chapter XIV.

Object.—The provisions of this section are intended to meet cases where acts which are in themselves lawful are done so rashly or negligently as to endanger human life or the personal safety of others.

The offence punishable by this and the following two sections is the doing of an act so rashly or negligently as to put in peril the lives and safety of others, but without an intention of causing hurt or any knowledge that hurt is likely to be thereby caused.

1. **'Act'.**—See s. 52, *supra*.

In order to determine whether an act was done rashly or negligently, no distinction ought to be drawn between the act itself and the instrument with which it is done. The accused, of whom four were Dharmakartas of a temple, were charged with having drawn a car which was not in a good condition and to have thereby done an act so rashly or negligently as to endanger human life. The Magistrate acquitted them on the ground that the rashness or negligence must relate to the act to bring it within the meaning of the section and not to the article or thing in respect of or in connection with which the act is done, because the rashness or negligence is the quality of the agent that does the act and not that of the subject of the action. The High Court disagreed with the opinion of the Magistrate and held that the real question for decision was whether the Dharmakartas had put the car into repair so as to satisfy themselves that it would be safely drawn[1].

2. **'Rashly or negligently'.**—See s. 304A, *supra*.

Act endangering personal safety of others should have been knowingly done.—A person, having a license to conduct swinging during a Hindu festival, was held not to render himself liable for this offence by allowing persons, in his absence, to swing by hooks inserted in the flesh, instead of by being attached to the pole by cloth, unless it was shown that he knew of it[2].

The accused was the lessee of a certain temple. It appeared that on a certain day in the year pilgrims and others in large numbers visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or the parapet of the well stood again about one foot above the platform. Early at night on the day of the congregation of pilgrims, an accident having occurred, the accused at the instance of the police-officer in charge had a light placed on or near the one-foot parapet, but at a later hour the accused had the light removed and thereafter between 1 and 2 A.M., while the people were again entering into the inner temple, a boy, who had no previous knowledge of the well and, in the darkness could not see it, fell into it, it was held that the accused was guilty under this section[3]. The accused, a taxi-cab driver, was licensed to drive, but owing to his defective eyesight, was asked to wear spectacles at the time of driving. One night, whilst he was driving without spectacles, his car collided with another; but it appeared that he was not to blame for the accident. Medical evidence showed that the defect in the eyesight of the accused was not very much and that it would not appreciably interfere with his efficiency as a driver. He was charged under s. 279 with driving his car in a manner so rash or negligent as to endanger human life. The trying Magistrate convicted him under this section of doing an act so rashly or negligently as to endanger human life. The High Court held that the accused had committed no offence under this section, inasmuch as it was not made

1 *Tipanna,* (1890) 1 Weir 337.

2 *Gopi Nath Mahto* v. *Mansaram Koomar,* (1900) 5 C. W. N. 376.

3 *Narsing Charan Mahapatra,* (1914) 18 C. W. N. 1176.

... so rashly

... possessing ... were arms of defence in the house and that anybody who might be mischievously inclined might take care of his safety It was held that such an act would not amount to an offence under this section[2]

Engine-driver letting off steam near a thoroughfare —An engine-driver was taking an engine which was letting off steam, along a public thoroughfare, at a time when the traffic was exceptionally heavy and within a few yards of a large number ... warnings from the ... held that he was ... ger would in fact be caused[3]

Throwing of stones —The mere throwing of stones on the roof of a person's house did not amount to a criminal offence unless it was done rashly or negligently so as to endanger human life or the personal safety of others[4] But if a person intentionally throws a stone at a house or on a house under such circumstances that, although he does not intend to cause hurt, and does not in fact cause hurt, yet he must know that he is likely to cause hurt, he commits an offence punishable under this section[5] Where a priest left his temple at night and then from outside deliberately threw bricks at the temple, hoping that the Hindus of the locality would believe that the bricks came from the Mahomedan quarters and that this would lead to a riot between the two communities it was held that the act was a deliberate one and not a rash or negligent act[6]

2 **'Rashly or negligently'** —See s 304A, *supra*

PRACTICE.

Evidence —Prove (1) that the accused did the act in question.

(2) That it was done rashly or negligently

(3) That it was such as to endanger the life or personal safety of others.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily

Causing hurt by act endangering life or personal safety of others.

337 Whoever causes hurt to any person by doing any act[1] so rashly or negligently[2] as to endanger human life, or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both

COMMENT

Hurt may be caused involuntarily, yet culpably There may have been no design to cause hurt, no expectation that hurt would be caused, yet there may have been a want of due care not to cause hurt [1]

A party shall not be deemed to be culpable in respect of any hurt, damage or other evil consequence resulting from his act, although he did not use the

[1] *Abas Mirza* (1918) 42 Bom 396 20 Bom L R 770, 4 Bom Cr C 231

[2] *Babu Ram* (192.) 23 A L J 326.

[3] *George Lowndes* (1887) 1 Weir 337

[4] *Nga Tha Ku* (1879) S J L B 91

[5] *Nga Myat Thin* (1898) P J L B 426.

[6] *Gaya Prasad* (1929) 51 All 465

[7] Note M, p 1 d

Of Wrongful Restraint and Wrongful Confinement.

The provisions under this head are for the punishment of offences, in which the offender, although he may have no design against human life, and no intention to inflict bodily hurt, either wholly deprives the injured person of his freedom or in some degree abridges his personal liberty. The personal restraint or confinement may, in some cases, be so slight as to deserve little more than a nominal punishment; but the arbitrary imprisonment of a person, which is often a quiet and convenient mode of persecuting him, is a most serious offence, deserving of exemplary punishment[1].

Wrongful restraint.

339. Whoever voluntarily obstructs any person[1] so as to prevent that person from proceeding in any direction in which that person has a right to proceed[2], is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

ILLUSTRATION.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

COMMENT.

Wrongful restraint means the keeping of a man out of a place where he wishes to be, and has a right to be[2]. 'Restraint' implies abridgement of the liberty of a person against his will. Where he is deprived of his will-power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint[3].

The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner, cannot be justified, and is punishable under this section[4].

The following illustrations, given in the original Draft Code[5], elucidate the meaning of this section:—

(*a*) A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.

(*b*) A illegally omits to take proper order with a furious buffalo which is in his possession and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A wrongfully restrains Z.

(*c*) A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.

(*d*) In the last illustration, if the dog is not really savage, but if A voluntarily causes Z to think that it is savage, and thereby prevents Z from going along the path, A wrongfully restrains Z.

From these illustrations it will appear that a person may obstruct another by causing it to appear to that other impossible, difficult, or dangerous to proceed, as well as by causing it actually to be impossible, difficult, or dangerous for that other to proceed.

1 M. & M. 300.
2 Note M, p. 154.
3 *Fateh Muhammad,* (1927) 29 P. L. R. 90.
4 *Saminada Pillai,* (1882) 1 Weir 339.
5 Page 59.

These illustrations were subsequently dropped as they were severely criticised but they indicate that the obstruction mentioned in the section does not mean physical obstruction alone but may mean show of force or threat which will induce a man to change his course Thus, where the accused removed a ladder and thereby detained a person on the roof of a house, he was held to have committed 'wrongful restraint'[1].

Ingredients.—The section requires two essentials.—

1 Voluntary obstruction of a person

2 The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed

1. 'Voluntarily obstructs, etc.'—This section relates to voluntary obstruction by a person and not to obstructions which are not voluntarily continued by the persons accused of the obstruction throughout the time the obstruction lasts[2] See s 39 as to the meaning of 'voluntarily'

The obstruction must be physical A verbal prohibition or remonstrance does not amount to such obstruction[3] Mere direction or demonstration will not constitute wrongful restraint[4] But physical presence is not necessary Where, therefore, the complainant and his wife and daughter occupied a house and during their temporary absence the accused put a lock on the outer door and thereby obstructed them from getting into the house, it was held that the accused was guilty of wrongful restraint[5]

2. 'P[illegible]
that pers[illegible]
should be [illegible] proceeding in any direction in which he has a right to proceed The wrong here defined is a wrong against the person, and is not completed where the person is at liberty to go in any direction he pleases Thus, where the complainant driving a bullock cart was obstructed from taking his cart through the passage, but there was no obstruction to the complainant passing through the passage alone without the cart, it was held that there could be no conviction for wrongful restraint for though the complainant was hindered from driving his cart through the passage, he himself was unobstructed[6] Where the accused took away the licenses from the complainants (boatmen) with the result that they were not permitted by the authorities to ply their boats beyond a certain stage in the channel, it was held that it did not amount to wrongful restraint The Court said "What section 339, Indian Penal Code, contemplates is that there must be obstruction attributable directly to the person charged, and the legislature apparently did not intend to include within the scope of the section an act which in its remote and indirect consequence might obstruct the free movement of a person"[7].

Public streets.—All members of the public have equal rights in public streets and no one section of the community can interdict another section of it from the lawful use of such streets Where the accused, a Brahmin, stopped the complainant, [illegible] ng along that [illegible] ming a [illegible] [illegible] the [illegible] [illegible] a person [illegible] proceeding along a path lying over the accused's private land in the exercise of the

1 [illegible]
2 [illegible]
3 [illegible]
4 [illegible] L J 212.
5 *Arumuga Nadar*, [1910] M. W N 727.
6 *Rama Lala* (1912) 15 Bom L. R. 103, 2 Bom Cr C 26, but see *Lakhan Vasaji*, (1925) 27 Bom L. R 1419 8 Bom Cr C. 1[illegible]
7 *Venkataramiah*, (190[illegible]) 11 Cr L J 1[illegible]
8 *Sundaresvara Nendhyal*, ([illegible]) [illegible] L J 602 25 L. W 677, 24 M. L T. [illegible] [1927] M W N 279
9 *[illegible] Ponnuswami Goundan*, ([illegible]) [illegible] L J 320

No wrongful restraint —Where the accused prevented the building of a party wall between two adjoining backyards[1], where toll was demanded of cartman in good faith, and they went away with their bullocks leaving the carts[2], where the complainant had, for the purpose of removal, placed certain goods upon a cart, and the accused came and turned the cart upside down, and the things fell to the ground, upon which the complainant went away[3], where the accused placed an obstruction in a road over which the complainant had a right of passage for men and cattle, thereby preventing cattle from passing but leaving a portion of the way in such a condition as to be passable by human beings[4], where A invited B to his house in order to be ready to give evidence in a judicial proceeding, and A used neither physical coercion nor threat of any kind to detain B in the house, but B from a mere general dislike or dread of giving offence to A remained there[5], where the accused caused Pariahs to stand in a public street in the vicinity of a temple with the object of preventing the complainant from conducting a religious procession from fear of pollution[6] and where the accused put up a tin projection over the complainant s compound wall so as to hang over his paved court yard at [illegible] not prevent [illegible] not amount

340 Whoever wrongfully restrains any person[1] in such a manner as to prevent that person from proceeding beyond certain circumscribing limits[2], is said "wrongfully to confine" that person.

Wrongful confinement.

ILLUSTRATIONS

(*a*) A causes Z to go within a walled space, and locks Z in Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall A wrongfully confines Z

(*b*) A places men with firearms at the outlets of a building and tells Z that they will fire at Z if Z attempts to leave the building A wrongfully confines Z

COMMENT.

Ingredients —The section requires two essentials —

1 Wrongful restraint of a person

2 Such restraint must prevent that person from proceeding beyond certain circumscribing limits

1. 'Whoever wrongfully restrains any person'.—Wrongful confinement, which is a form of wrongful restraint, is the keeping of a man within limits out of which he wishes to go, and has a right to go[3]

2. 'Prevent that person from proceeding beyond certain circumscribing limits'.—There must be a total restraint, not a partial one If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he cannot be said thereby to imprison him Imprisonment is a total restraint of the liberty of the person, for however short time and not a partial obstruction of his will, whatever inconvenience it may bring on him[9]

1 *Venkatachalam Pillai* (1881) 1 Weir 339
2 *Pallu Chenchu Reddi* (1883) Weir (3rd Edn) 2 8
3 *Juggeshwar Dass v Koylash Chunder Chatterjee* (188?) 12 Cal 55
4 (1899) 1 Weir 340
5 *Lakshman Kalyan* (1875) Cr R. for 1875, Unrep Cr C 89
6 *Venkata Subba Reddy* (1910) 7 M L [illegible] 30? [1910] M W N ?2
7 *Chhagan Lalal* (192?) 29 Bom L R 491 D Lim Cr C 69
8 Note M p 154
9 *Bird v Jones* (1845) 7

take [charge of him, the police officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody[1].

Difference between malicious prosecution and false imprisonment.—It becomes necessary here to consider the difference between s 211 and this section, i e, between malicious prosecution and false imprisonment "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them"[2] Thus, the question is, does the defendant set a ministerial or a judicial officer in motion ? If the former, he may be liable for false imprisonment, if the latter, for malicious prosecution

CASES.

Wrongful confinement—Where the accused refused to obey an order in writing improperly issued by a police officer, and the police thereupon took her into custody[3] where a Superintendent of Police illegally wrote a letter to a person, [illegible] which he could not be arrested without a warrant, [illegible] before a Magistrate, and sent two constables to [illegible] him from speaking to anyone[4], where a person [illegible] subsequently re arrested on the same charge[5], where a police officer arrested, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India[6], where a Village Magistrate maliciously ordered a certain person, who had resisted the detention of pigs found trespassing, to be arrested[7], where a Jail Doctor confined an offender, who was already undergoing imprisonment, in a cell within the jail for the purpose of administering enema against his will[8], where an Abkari Inspector detained a man all night to prevent his being tampered with[9], where a person living in a town, where medical assistance was available, kept in heavy chains his own brother who was subject to insanity of an intermittent kind and who was found to be sane by the District Judge who ordered his production before the Court[10], where the accused got the complainant who was their debtor arrested and taken to jail by a bailiff during the subsistence of a protection order in his favour[11], and where a person acting under a bona fide belief [illegible]

days They were not fettered, but they were made to stay in a circumscribed limit Their meals were brought to them, or police or village servants were sent with

1 *Behary Singh* (1867) 7 W R (Cr) 3.
2 Per Willes, J, in *Austin* v *Dowling*, (1870) L R 5 C P 534, 540
3 *Lakshmigadu*, (1880) 1 Weir 342.
4 *Paranlusam Narasaya Pantulu* v *Captain R A C Stuart*, (1865) 2 M H C 396.
5 *Pamdass Salkoo* v *Anund Chunder Roy*, (1873) 19 W R (Cr) 27
6 *Mukund Babu Lethe*, (1894) 19 Bom 72. See *Khasoo Jivaji* v *Mulji Dayal*, (1888) 12 Bom 377
7 (1870) 5 M H C App 24
8 *Baistab Charan Shaha*, (1902) 30 Cal 95.
9 *Dhansa* v *J L Clifford*, (1888) 13 Bom 376.
10 *Shimbu Narain*, (1923) 45 All 495
11 *Thiruvengadachariar* v *Chockalingam Chetty*, (1923) 18 L. W. 167
12 *Anant Prasad Pa*[illegible] 8 P [illegible] 94

them to their houses for their meals and they were brought back. It was held that the accused was guilty of wrongful confinement[1]. Where two police-officers arrested without a warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property, it was held that the arrest having been made by the police-officer without a warrant, for a non-cognizable offence, their action amounted to wrongful confinement, unless it was justified under the provisions of the Code relating to the right of private defence or under s. 81[2]. Accused No. 1 brought a woman, who was his kept mistress, from Kolhapur and kept her with accused No. 2, a brothel-house-keeper in Bombay. On previous occasions too he had supplied women to accused No. 2 to be used as prostitutes. The woman was made to live as a prostitute in the house, the entrance to which was guarded; and a watch was kept over her movements. Occasionally she was allowed to go out under surveillance. It was held that both the accused were guilty of wrongfully confining the woman[3].

Mistaken exercise of power by a police-officer.—Where a person went to a police station to lodge a complaint, and the police-officer, in consequence of something, restrained the person until he consulted his superior, and then discharged him on his own recognizance, he was held to have committed no offence. The Court said: "Although the petitioner may have exceeded the limits of his authority, and may have done an act which he was not justified in doing, and so rendered himself liable to a civil suit for damages, the facts found do not, in our judgment, amount to the criminal offence of wrongful restraint"[4]. The accused, a police-officer, came down to Bombay from up-country with a warrant to arrest a person. After reasonable inquiries and on well-founded suspicion he arrested the complainant under the warrant believing in good faith that he was the person to be arrested. The complainant having proceeded against the accused for wrongful confinement, it was held that the accused had committed no offence since he was protected by s. 76[5].

Legal arrest.—Where the arrest is legal, the police-officer making the arrest cannot be successfully proceeded against on a charge under this section[6]. An officer arresting a judgment-debtor under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor till the next sitting of the Court[7].

Punishment for wrongful restraint.

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

PRACTICE.

Evidence.—Prove (1) that the accused obstructed a person.

(2) That such obstruction prevented the person from proceeding in a direction in which he had a right to proceed.

(3) That the accused caused such obstruction voluntarily[8].

1 *Shamlal Jairam*, (1902) 4 Bom. L. R. 79.
2 *Gopal Naidu*, (1922) 46 Mad. 605, F.B.
3 *Bandu Ibrahim*, (1917) 42 Bom. 181, 20 Bom. L. R. 79, 4 Bom. Cr. C. 174.
4 *Budrool Hoosein*, (1875) 24 W. R. (Cr.) 51. See *Griffin* v. *Coleman*, (1859) 4 H. & N. 265.
5 *Gopalia Kallaiya*, (1923) 26 Bom. L. R. 138, 7 Bom. Cr. C. 128.
6 *Amarsang Jetha*, (1885) 10 Bom. 506.
7 *Samuel*, (1906) 30 Mad. 179.
8 *Vide* s. 39, supra.

The obstructor must intend or know or have reason to believe it to be likely that the means adopted would cause the obstruction of the complainant[1]

Procedure —Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily

Magistrate cannot order the removal of an obstruction — A Magistrate, while convicting an accused person for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, cannot pass an order, under this section, that the hut or other means of obstruction should be removed[2]

Statutory application —See the Madras City Municipal Act (Mad Act IV of 1919), s 364

Punishment—' The offence of wrongful restraint, when it does not amount [illegible] is not accompanied with violence, or with [illegible] serious offence, and we propose, therefore,

342 Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees or with both

Punishment for wrongful confinement

PRACTICE

Evidence.—Prove (1) that the accused obstructed the complainant

(2) That such obstruction was voluntary

(3) That the effect of such obstruction was to restrain that person from proceeding beyond a certain limit

(4) That the restraint was wrongful

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class

Separate sentences —Where the accused were convicted under this section and s 352, and sentenced separately for each of the offences, the acts found against them being that they seized dragged, and pushed the complainant to a certain place in order to punish him it was held that what the accused had been punished for was the whole series of acts, and that series of acts came within the definition both of wrongful confinement and using of criminal force, and accordingly the case fell within the second para of s 71[4] Where wrongful confinement was the common object of an unlawful assembly, and that was the essential ingredient in the constitution of an offence under s 147, it was held that, having regard to the provisions of s 71, a separate sentence for wrongful confinement was illegal[5]

Charge.—The charge should run thus —

I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, wrongfully confined AB, and thereby committed an offence punishable under s 342 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

[1] *Iramuga Nair*, (1910) M W N 727

[2] *Mohini Mohan Chowdhry v Harendra Chandra Chowdhry* (1904) 31 Cal 691 F B, overruling *Debendra Chandra Chowdhury v Mohini Mohan Chowdhury* (1901) 5 C W N 432

[3] Note M, p 154

[4] *Fakira Khan* (1905) 4 C L J 60

[5] *Alim Sheikh v Shaha alt Singh Bar Lundi*, (1904) 1 Cr L J 365

Wrongful confinement for three or more days.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The period of three days will be counted from the time that the complainant is illegally confined.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342 and (5) that such restraint was for a period of three or more days.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—See the form of charge for s. 342. In that form for "confined AB" substitute' "confined AB for—days".

Wrongful confinement for ten or more days.

344. Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Object.—The authors of the Code say: "One aggravating circumstance is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment, which, indeed, might be so harmless as not to amount to an offence...But wrongful confinement continued during many days will always be a most serious offence. We have attempted to frame the law on this subject in such a manner as to give the offender a strong motive for abridging the detention of his prisoner"[1]. The Law Commissioners observe: "One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence he is every day becoming liable to a certain additional punishment, the motive to set his prisoner free will grow stronger daily"[2].

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342 and (5) that such restraint was for a period of ten or more days.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Punishment.—Fine alone is not a legal sentence for a prisoner convicted under this section[3].

Charge.—See the form of charge for s. 342. In that form for "confined AB" substitute "confined AB for——days".

1 Note M, pp. 154, 155.
2 1st Rep. s. 393.,
3 *Bahirji bin Krishnaji*, (1863) 1 B. H. C. (Cr. C.) 39.

345 Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter

Wrongful confinement of person for whose liberation writ has been issued.

COMMENT

There must be knowledge on the part of the accused that a writ of liberation has been issued Mere belief is not sufficient knowledge is a much stronger word than belief as the latter is stronger than suspect [1]

PRACTICE

Evidence —Prove (1) that the accused kept a person in confinement

(2) That such confinement was wrongful

(3) That a writ of liberation had been duly issued

(4) That the accused knew of such writ when he kept the person wrongfully confined

Procedure —Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session Presidency Magistrate or Magistrate of the first or second class

Charge —I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, wrongfully confined AB knowing at the time of such wrongful confinement that a writ for the liberation of the said AB had been duly issued and thereby committed an offence punishable under s 345 of the Indian Penal Code and within my cognizance [*or* cognizance of the Court of Session (*or* High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

346 Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known[1] to any person interested in the person so confined, or to any public servant[2], or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement

Wrongful confinement in secret

COMMENT

The offence consists in wrongful confinement aggravated by the offender's endeavour to deprive his prisoner and those interested in him or bound to protect him of the remedies which the law gives against this wrong

1. **'Intention that the confinement of such person may not be known'** —In order to render a person liable under this section it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the

[1] *Ranjo Timaji*, (1880) 6 Bom 402, 403.

person confined should not be discovered. The complainant, a woman, went to the Court to lodge a complaint of ill-treatment and torture against some relatives of the accused. The case not having been finished that day, she was asked to attend the Court the next day. As she was departing she was accosted by the accused who put her into a carriage and drove her away, taking her to various places, all strange and unknown to her at one or other of which she was detained. But a stir having arisen in the meantime on account of her disappearance she was brought back by the accused and produced by them before a pleader, in whose premises she remained till next day when she was made over to the police. The Sessions Judge convicted the accused under this section but the High Court set aside the conviction on the ground that there was no intention that she should not be discovered and that her confinement was not actual but potential as she was induced but not forced[1].

2. **'Public servant'.**—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 342; and (5) that such confinement was secret against (*a*) any person interested in the captive, or (*b*) a public servant, or (*c*) discovery of the place of confinement.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by the Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Wrongful confinement to extort property or constrain to illegal act.

347. Whoever wrongfully confines[1] any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security[2], or of constraining the person confined, or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence[3], shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

This and the next section may be compared with ss. 329 and 330, as the aggravating circumstances mentioned in the former are the same as in the latter.

1. **Wrongfully confines'.**—A Head Constable in charge of a police outpost agreed to drop proceedings against K, who had been arrested on a certain charge, on condition that K paid to him a sum of money. The Head Constable sent away K in charge of two *chowkidars* to procure the money. In order to effect this object the *chowkidars* subsequently confined K at various places and maltreated him. It was held that it would be impossible to hold the Head Constable guilty of abetting an offence under this section in the absence of proof that he gave definite orders to that end[2].

2. **'Valuable security'.**—See s. 30, *supra*.

3. **'Offence'.**—The word "offence" here means a thing punishable under this Code or any special or local law (s. 40).

[1] *Sreenath Banerjee*, (1882) 9 Cal. 221.

[2] *Lachmun Singh*, (1904) 31 Cal. 710.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s 342, and

(5) that such confinement was for the purpose of (*a*) extorting property, or a valuable security, or (*b*) constraining the doing of anything illegal, or (*c*) giving information which might facilitate the commission of an offence

(6) That such extortion or constraint was from, or of, the person confined, or someone else interested in him

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge—I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of——, at——, wrongfully confined AB for the purpose of extorting from the said AB [*or* from a certain person interested in the said AB to wit CD] a certain property to wit—— and thereby committed an offence punishable under s 347 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Wrongful confinement to extort confession or compel restoration of property

348 Whoever wrongfully confines[1] any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence[2] or misconduct or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security[3] or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

COMMENT

This section may be compared with s 330

1 'Whoever wrongfully confines'.—The person liable is the person who wrongfully confines The appellants charged the prosecutor with theft, and he was handed over to the police It was held that the police and not the appellants, were responsible for any oppression or extortion practised by the police on the prosecutor while in confinement[1]

2 'Offence'.—The word 'offence' here means a thing punishable under this Code or any special or local law (s 40)

3. 'Valuable security'.— See s 30, *supra*

PRACTICE

Evidence—Prove points (1) to (4) as those for s 342, and

(5) that such confinement was for the purpose (*a*) of extorting a confession or some information etc, or (*b*) of constraining the restoration of some property, or (*c*) valuable security, etc

1 *[illegible] Pauley* ([illegible]) [illegible] W R (Cr)

(6) That such extortion or constraint was from, or of, the person confined, or some other person interested in him.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

As to joinder of charges, see *Fakirapa*[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, wrongfully confined one AB for the purpose of extorting from the said AB (*or* from one CD in whom the said AB was interested) any confession (*or* any information which may lead to the detection of an offence, *or* misconduct, *or* for the purpose of constraining the person confined to restore, *or* to cause the restoration of any property *or* valuable security, *or* to satisfy any claim or demand, *or* to give information which may lead to the restoration of any property *or* valuable security), and thereby committed an offence punishable under s. 318 of the Indian Penal Code, and within my cognizance [*or* the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Criminal Force and Assault.

349. Force. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact, with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal[1] to move, to change its motion, or to cease to move.

COMMENT.

This section gives an elaborate explanation of the expression "to use force" The illustrations to s. 350 exemplify the various clauses of the definition given in this section.

1. **'Animal'.**—See s. 47, *supra*.

350. Criminal force. Whoever intentionally uses force to any person, without that person's consent[1], in order to the committing of any offence[2], or intending by

1 (1890) 15 Bom. 491.

the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used[1], is said to use criminal force to that other

ILLUSTRATIONS

(a) Z is sitting in a moored boat on a river A unfastens the moorings, and thus intentionally causes the boat to drift down the stream Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part A has therefore intentionally used force to Z, and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z

(b) Z is riding in a chariot A lashes Z's horses, and thereby causes them to quicken their pace Here A has caused change of motion to Z by inducing the animals to change their motion A has therefore used force to Z, and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z

(c) Z is riding in a palanquin A, intending to rob Z, seizes the pole, and stops the palanquin Here, A has caused cessation of motion to Z, and he has done this by his own bodily power A has therefore used force to Z, and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z

(d) A intentionally pushes against Z in the street Here A has by his own bodily power moved his own person so as to bring it into contact with Z He has [illegible] has done so without Z's consent [illegible] thereby injure, frighten or annoy [illegible]

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z, and if he did so without Z's consent, intending thereby to injure, frighten or annoy [illegible]

[illegible] woman's veil Here A intentionally uses force [illegible] consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her

(g) Z is bathing A pours into the bath water which he knows to be boiling Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling A has therefore intentionally used force to Z, and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force

(h) A incites a dog to spring upon Z, without Z's consent Here, if A intends to cause injury, fear or annoyance to Z he uses criminal force to Z

COMMENT.

The preceding section defined 'force'. This [illegible] criminal when it is used (1) without consent and [illegible] offence or (2) when it is intentionally used to [illegible]

to another to whom the force is used. The term 'force' as defined here applies to force used in connection with the human body[1].

The term 'criminal force' includes what in English law is called 'battery'. It will, however, be remembered that 'criminal force' may be so slight as not to amount to an offence (s. 95), and it will be observed that 'criminal force' does not include anything that the doer does by means of another person. The definition of 'criminal force' is so wide as to include force of almost every description of which a person is the ultimate object[2].

The present definition of 'criminal force' was called 'assault' in the original Code. Speaking of it, the framers of the Code say: "We have found great difficulty in giving a definition of assault, and are by no means satisfied with that which we now offer. As, however, it at present appears to us to include all that we mean to include, and to exclude all that we mean to exclude, we have adopted it in spite of the objections which we feel to its harsh and quaint phraseology. We have adopted it with the less scruple, because we trust that the illustrations will render every part of it intelligible to an attentive reader.

"A large proportion of the acts which we have designated as assaults will be offences falling under the heads of hurt and restraint. Thus, a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horsewhip, who maliciously throws a stone at a person, squirts dirty water over a person, or sets a dog at a person, may cause no hurt and no restraint, yet it is evident that such acts ought to be prevented"[3].

Ingredients.—The section requires the following essentials:—

1. The intentional use of force to any person.
2. Such force must have been used without that person's consent.
3. It must have been used—

(*a*) in order to the committing of any offence; or

(*b*) with the intention to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom it is used.

Illustrations.—Illustration (*a*) exemplifies 'motion', in s. 349; ill. (*b*), 'change of motion'; ill. (*c*) 'cessation of motion'; ills. (*d*), (*e*), (*f*), (*g*) and (*h*), 'causes to any substance any such motion'; ills. (*d*), (*e*), (*g*) and (*h*), 'brings that substance into contact with any part of that other's body'; ills. (*f*) and (*g*), 'other's sense of feeling'. Clause (1) of s. 349 is illustrated by ills. (*c*), (*d*), (*e*), (*f*) and (*g*); cl. 2, by ill. (*a*); and cl. 3, by ills. (*b*) and (*h*)

1. 'Whoever intentionally uses force to any person, without that person's consent'.—The use of force must be intentional. Mere submission by one who does not know the nature of the act done cannot be consent[4]. See s. 90 as to the meaning of 'consent'.

Where the accused went to the field of another and cut the crops sown by him and on the latter resisting they raised their sticks to strike him and that other ran away to save himself, it was held that the accused were guilty of using force by means of bodily power within the meaning of this section[5]. The accused having been brought to a certain place to serve as a cooly attempted to run away, but was obstructed and prevented from doing so by a peon. In the struggle which ensued

[1] *Sadasib Mandal*, (1913) 18 C. W. N. 1150.
[2] *Rasul*, (1888) P. R. No. 4 of 1889. See *Rose* v. *Kempthorne*, (1910) 22 Cox 356, 27 T. L. R. 132.
[3] Note M. p. 155.
[4] *Lock*, (1872) L. R. 2 C. C. R. 10, 14.
[5] *Jai Ram*, (1914) 12 A. L. J. 154; *Ashiq Husain Khan*, (1922) 24 Cr. L. J. 857.

the accused seized the peon by the wrist, and attempted to get away It was held that the accused did not commit this offence as he had acted in self-defence[1]

2. **'In order to the committing of any offence'.**—The force must have been used for the purpose of committing an offence See s 40 as to the definition of 'offence'

3. **'Intending by the use of such force to cause, injury, fear or annoyance to the person to whom the force is used'.**—The force must have been used with the intention to cause or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used

See s 44, *supra*, as to the meaning of the word 'injury

Diseased spleen.—Where the accused struck a person, who had an enlarged spleen, in the course of a quarrel, and that person died owing to his bodily infirmity, it was held that the accused was guilty under this section[2] For other similar cases, see ss 319 and 320

Rescuing persons arrested by the police —Two police constables in the bona fide execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued, whereupon certain persons came up and rescued the prisoner and tore up the warrant but did not cause hurt to any one It was held that the rescuers were guilty of using criminal force[3]

Assault

351. Whoever makes any gesture[1], or any preparation, intending or knowing it to be likely[2] that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault

Explanation[3] —Mere words do not amount to an assault But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

ILLUSTRATIONS

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z A has committed an assault

(b) [illegible] intending, or knowing it to be [illegible] he is about to cause the dog to a [illegible]

(c) A takes up a stick, saying to Z, ' I will give you a beating Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault

COMMENT

It is not every threat, when there is no actual personal violence, that constitutes an assault There must, in all cases, be the means of carrying the threat into effect If a person is advancing in a threatening attitude, with an intention to strike another, so that his blow will almost immediately reach the other, if he is not stopped, then, this is an assault in point of law, though, at the particular moment when he is stopped, he is not near enough for his blow to take effect[4]

[1] *Ganpati* (1892) Unrep Cr C 607
[2] *Jai Dyal*, (1870) P R No 21 of 1870
[3] *Gokal*, (1922) 45 All 142
[4] *Stephens v Myers*, (1830) 4 C & P 349

Assault: criminal force.—An assault is something less than the use of criminal force, the force being cut short before the blow actually falls. It seems to consist in an attempt or offer by a person having present ability with force to do any hurt or violence to the person of another. And it is committed whenever a well-founded apprehension of immediate peril from a force already partially or fully put in motion is created. *An assault is included in every use of criminal force*[1].

English law.—*An assault consists in an attempt or offer by a person having* present ability, with force, to do any hurt or violence to the person of another. Striking at another with a cane, stick, or fist, although the blow misses, drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike, presenting a loaded gun at a man within range, or any other act indicating an *intention to use violence against the person of another*, is an assault. Battery is defined to be "any least hurt or violence unlawfully and wilfully or culpably done to the person of another".

Ingredients.—The section requires two things—

1. Making of any gesture or preparation by a person in the presence of another.

2. *Intention or knowledge of likelihood that such gesture or preparation* will cause the person present to apprehend that the person making it is about to use criminal force to him.

1. 'Makes any gesture, or any preparation'.—See ill. (*a*) which illustrates that gestures which cause a person to apprehend that the person making them is about to use criminal force amount to an assault. It is an assault to point a loaded pistol at anyone[2].

See ill. (*b*) as to 'preparation'. Though mere preparation to commit a crime is not punishable (see Comment on s. 511, *infra*) yet preparation with the intention specified in this section amounts to an assault.

2. 'Intending or knowing it to be likely'.—Intention is the gist of the offence. *The gesture or preparation must be of such a nature that the person* in whose presence it is made should apprehend that criminal force would be used to him. Throwing a bottle into a house, among the inmates, with the intention of hurting or frightening them, constitutes assault[3].

Where one of the accused hit a constable and the others surrounded the constable *in a threatening manner, it was held that this finding was not sufficient to* convict the others of assault[4].

The appellant met the respondent in the street and tendered him an order for discovery, which had been made against the respondent in a County Court action, the appellant acting on *behalf of the solicitor to the other party* to the action. The respondent refused to accept the document, and the appellant thrust it into the inner-fold of the respondent's coat. It was held that, as the appellant was entitled to serve the respondent personally and as there was no evidence that the appellant touched the respondent more than was necessary to bring the document home to the respondent, the appellant was not guilty of an assault on the respondent[5].

Mere words do not amount to an assault, but the words which the party threatening uses at the time may either give his gestures such a meaning as may make them amount to an assault, or, on the other hand, may prevent them from being held to amount to an assault. In the latter case the effect of the words must be such as clearly to show the party threatened that the party threatening has no present intention to use immediate criminal force[6]. A preparation taken

1 M. & M. 309.
2 *Jeremiah James*, (1844) 1 C. & K. 530.
3 *Po Taw*, (1906) 3 L. B. R. 194.
4 *Munisami*, (1910) 8 M. L. T. 118.
5 *Rose* v. *Kempthorne*, (1910) 22 Cox 356, 27 T. L. R. 132.
6 *Cama* v. *Morgan*, (1864) 1 B. H. C. 205.

with words which would cause a person to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault There must be evidence to show that the accused was about to use criminal force to him then and there[1] See ill (c)

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both

Punishment for assault or criminal force otherwise than on grave provocation

Explanation[1] —Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence[2].

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact

COMMENT

This section provides punishment for assault or use of criminal force when there are no aggravating circumstances

1. **'Explanation'.**—See Comment on exception 1 to s 300 If there is grave provocation very light punishment is to be inflicted

2 **'Right of private defence.'**—See ss 96 to 100 and Comment thereon.

PRACTICE.

Evidence —Prove (1) that the accused made a gesture or preparation to use criminal force

(2) That the same was made in the presence of the complainant

(3) That he intended, or knew, that it was likely that such gesture, etc , would cause the complainant to apprehend that such criminal force would be used

(4) That such gesture, etc , did cause the complainant to apprehend the same

(5) That the accused received no grave or sudden provocation from the complainant

To substantiate a charge of assault on a particular person, it is not enough to prove that the words used and the preparations made by the accused were calculated to cause that person to apprehend that criminal force would be used to him, if he persisted in a certain course of conduct, there must be evidence to show that *the accused was about to use criminal force to him then and there*[2]

Or prove (1) that the accused used force[3] to the complainant

(2) That he did so intentionally.

1 *Barbal Khalifa*, (1902) 30 Cal 97

2 *Ibid.*

3 Vide s. 349, *supra*.

(3) That he used such force, without the complainant's consent.

(4) That he did so in order to commit an offence; or that he thereby intended to cause, or knew that he would thereby be likely to cause, injury, fear or annoyance to the complainant.

(5) That he received no grave or sudden provocation from the complainant.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

The Lahore Rule.—It has come to notice that Magistrates are apt to confound ss. 352 and 323 of the Indian Penal Code, and to issue process and convict under the former section in cases in which the complaint is laid under s. 323, and the evidence for the prosecution establishes the fact of violence having been actually used.

2. In some cases this is possibly done purposely, because charges under s. 352 are triable as summons-cases, whereas a charge under s. 323 must be tried as a warrant-case. The procedure in the former class of case is, no doubt, easier to the Magistrate; but it is less favourable to the accused, for in warrant cases the Magistrate is bound to call upon the accused for his defence, unless he discharges him (see ss. 253 to 256 of the Code of Criminal Procedure), while in a summons-case the accused is primarily responsible for the production of his evidence on the day fixed for hearing (s. 244).

3. It is accordingly pointed out that s. 352 of the Indian Penal Code does not apply to cases where the offender uses criminal force which actually causes hurt to the person against whom it is displayed, and that such cases fall under s. 323 of the Indian Penal Code.

4. It has been ruled that s. 304A is inapplicable to cases in which an assault, however petty, is deliberately made, and death ensues. Such cases fall either under s. 302, s. 304, or s. 335, s. 325 or s. 323[1].

Autrefois acquit.—A person who is tried and discharged for the offence of using criminal force under this section cannot again, upon the same complaint, be tried for causing hurt, for, under whatever denomination the offence is classed, it is the one offence of assault[2].

Complaint.—A Munsiff held an enquiry under s. 476, Criminal Procedure Code, and having come to the conclusion that the accused had committed offences under ss. 183 and 352 in connection with certain execution proceedings sent the case to the District Magistrate who transferred it to a Deputy Magistrate. The Deputy Magistrate acquitted the accused on the ground that there was no sanction. On appeal, the High Court held that with regard to s. 183 the Magistrate ought to have proceeded with the case according to law, and that with regard to s. 352 no sanction was required[3].

Punishment.—A sentence inflicting a fine of Rs. 50, and awarding imprisonment for one month in default of payment of fine, was held to be illegal with reference to s. 65 and this section[4].

Assault or criminal force to deter public servant from discharge of his duty.

353. Whoever assaults[1] or uses criminal force[2] to any person being a public servant[3] in the execution of his duty as such public servant[4], or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such

1 L. H. C. C. R. & O. Chap. XXVI, Vol. II, p. 125.

2 *Kaplan* v. *Smith*, (1871) 7 Beng. L. R. App. 25, 16 W. R. (Cr.) 3.

3 *Arjan Pramanik*, (1904) 41 Cal. 664.

4 *Jehan Buksh*, (1871) 16 W. R. (Cr.) 42.

person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

COMMENT.

If hurt is caused under the circumstances mentioned in the section then either s 332 or s 333 will apply

1. **'Assaults'**—See s 351, *supra*

2. **'Criminal force'**.—See s 349, *supra*

3. **'Public servant'**.—See s 21, *supra*[1]. A *pagi*, who is a village watchman remunerated by fees paid by the villagers, is a public servant within the meaning of this section[2] Similarly, a lascar in the Public Works Department distributing water from public irrigation channels is a public servant[3] The accused cannot claim exoneration on the ground that the person whom he assaulted was not attired in the livery which is ordinarily associated with the duty which he claimed to be discharging if in fact the accused knew him to be a public servant acting in the execution of his duty as such servant[4]

4. **'In the execution of his duty as such public servant'**.—These words mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done in good faith under colour of his office[5] The public servant must be acting in the execution of his duty as such public servant A commissioner attempting to give possession under a time expired warrant has no authority to go upon land in the possession of the party, who resists the execution The persons offering resistance are not guilty of an offence under this section[6] A vaccinator who vaccinates in a place where vaccination is not compulsory is not discharging any duty under the law when attempting to vaccinate a child A person, therefore who prevents a vaccinator from vaccinating a child, in a place where vaccination has not been made compulsory, is not guilty of an offence under this section[7] Where a cart owner refused to give his cart for the use of a Forest Settlement Officer, who required it as per executive orders of Government, and assaulted the peon in preventing him from seizing his cart it was held that he could not be convicted of an offence under this section, because the rules aforesaid had not the force of law, and a public servant acting under them was not acting in the execution of his duty[8] A Tahsildar deputed his peon by a written order to procure some camels for the camp of a Settlement Officer When the peon attempted to seize the camels of the accused he was assaulted by the accused and prevented from seizing the camels It was held that the accused had committed no offence[9] The Collector has no authority to issue a distress warrant to a police-officer under the Income-Tax Act of 1922 for arrear of income tax A police-officer executing such a warrant is not acting in the [illegible]

1 [illegible] Weir (3rd Edn) 203
2 [illegible] Narsing Criminal Revision No 377 [illegible] Chan[illegible] [illegible] Dr. (1907) 35 Cal 331, [illegible] (1913) I L R. No. 3[illegible]5 of 1913.

6 *Abinash Chandra* [illegible] v *Ananda Chandra Pal* (19[illegible]4 [illegible] Cal 424, [illegible] (1923) 19 N L R [illegible]
7 [illegible] 19 [illegible] L J 238
8 *Palli*[illegible] 5[illegible]8
9 [illegible] No. 32[illegible] of 19[illegible] *Gokal Chand* [illegible] C[illegible] L J [illegible] case of [illegible] P L R [illegible] 19[illegible] 19 of 1912 [illegible]
10 [illegible] 4 P L [illegible]

knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under this section for using criminal force to deter a public servant in the execution of his duty, it was held that no offence had been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house-trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable[1].

Where a Collector's peon was deputed to keep the peace during a distraint, and, when on the road to execute the order, was assaulted by the accused who attempted to deprive him of his *perwana*, it was held that the accused had committed an offence under this section[2]. A warrant of arrest was issued against R, on a charge of cheating, to the Sub-Inspector within whose jurisdiction R resided. That officer ordered his subordinate constables to be on the look-out for R and arrest him wherever found. One of the constables came across R and proceeded to arrest him informing him of the issue of a warrant against him. The warrant itself was, however, not produced. The accused interfered with the constable in arresting R and managed to prevent his arrest. It was held that under s. 54 (1) of the Criminal Procedure Code the constable was empowered to make the arrest without warrant as he had credible information that the person wanted had committed a cognizable offence and in making the arrest he was occupied in the discharge of his duty as a police-officer and any interference with that arrest amounted to obstructing a police-officer in the discharge of his duty and was an offence under this section[3]. A warrant of attachment was endorsed to a bailiff for execution and another bailiff was directed to act with the former in the execution of the warrant. The accused whose property was to be attached under the warrant assaulted the latter bailiff and prevented him from attaching his property. It was held that the second bailiff was acting in good faith as a public servant and the accused was, therefore, guilty of an offence under this section[4]. If the act of the public servant is authorized by law any resistance will be deemed penal, e. g., assaulting a public servant carrying on a search[5], or executing a writ of delivery of possession[6], or resisting a public servant directed to survey the accused's and[7].

CASES.

Defect in a warrant.—Where the warrant for the arrest of a person, in execution of a civil process, was not signed in full under s. 251 of the Criminal Procedure Code, but was initialled by the officer issuing it, and was resisted by that person when the officer to whom it was entrusted sought to execute it, it was held that the person was guilty under this section, and the preliminary defect of the warrant formed no defence[8]. It was held, similarly, where the provisions of s. 82 of the Civil Procedure Code were not complied with before the issuing of a warrant under which the accused was arrested but rescued by his friends[9]. But if the warrant issued to a constable to arrest a person is invalid, as, for instance, where it is signed by an Honorary Magistrate who is not the presiding officer under s. 75, Criminal

1 *Dorasamy Pillai*, (1903) 27 Mad. 52.
2 *Methi Mullah*, (1870) 13 W. R. (Cr.) 49; *Kandaswami Goundan*, (1923) 46 M. L. J. 45. See *Ramasami*, (1889) 13 Mad. 131.
3 *Gopal Singh*, (1913) 36 All. 6; *Prokash Chandra Kundu*, (1914) 41 Cal. 836.
4 *Abdul Ghani*, (1922) 25 Cr. L. J. 122.
5 *Bissar Misser*, (1913) 41 Cal. 261; *Bhim Singh*, (1918) 20 Cr. L. J. 174.
6 *Preo Lal Mukerjee*, (1913) 18 C. W. N. 548.
7 *Judagi Raut*, (1916) 2 P. L. J. 18, 3 P. L. W. 429.
8 *Janki Prasad*, (1886) 8 All. 293. See *Diwan Singh*, (1885) 5 A. W. N. 244; *Narsingabhan*, Weir (3rd Edn.) 204; *Latchmana Goundan*, (1883) 1 Weir 343; *Perumalu*, (1885) 1 Weir 344; *Abdul Gafur*, (1896) 23 Cal. 896; *Bankey Behary Singh*, (1918) 3 P. L. J. 493.
9 *Narbadeshwar*, (1905) 27 All. 491.

Procedure Code, the person against whom it is issued cannot be convicted under this section if with the assistance of other persons he manages to free himself from the constable and escapes[1]. Similarly, where the provisions of s 77, Criminal Procedure Code, were not complied with and the warrant was illegal, the person helping the persons arrested to escape is not guilty of any offence[2] A warrant of execution which does not bear a date on or before which it should be executed is not a good warrant[3] A warrant issued by a Revenue Officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal, and persons assaulting the public servant to help the witness to escape are not guilty of an offence under this section[4].

Search without a proper order or warrant.—Where the accused resisted a public officer who attempted to search a house, in the absence of a proper written order authorizing him to do so, he was held to have committed no offence under this section[5] The Madras High Court has held that a search without a search warrant does not justify an obstruction or resistance to an officer, if he was acting in good faith and without malice[6]

Unlawful act of a public servant is a good defence.—Where a licensed vaccinator attempted to take lymph from a child of one accused to vaccinate the child of the other, and was assaulted in consequence and received slight injuries, it was held that he was not entitled to take lymph from the arm of any person who [illegible] so was unlawful, and that the accused were [illegible] the accused, on a vaccinator ordering a village [illegible] out his child for vaccination, threatened to strike with a spade anyone who should enter his house, it was held that he was not guilty of assaulting a public servant under this section[8] An Excise peon with the avowed object of seeing if *chandul* (a smoking mixture of opium) was not being manufactured, ascended the stairs of accused No 1's house and looked into the [illegible]

he was not authorized to e[illegible] seeing if *chandul* was being [illegible] visit being paid to him by [illegible] be taken, and, on the officer attempting to take it, produced a club saying he would not allow the impression to be taken, and, if any one asked for it, he would break his head, it was held that the act of the *surveille* did not amount to an assault and that his conviction under this section could not be sustained[10] Where, under a warrant authorising distraint of the property of a person [illegible]

[illegible] e accused, on being asked [illegible] spector without a written

1 *Jagpat Koeri* (1917) 1 P L W 306.

2 *Paramathu Pilai*, (1927) 53 M. L. J 220, 28 L. W 141

3 *Mohini Mohan Banerji*, (1916) 3 P L. W. 64

4 *Jogendra Nath v Hiralal*, (1924) 51 Cal 402.

5 *Narain*, (187-) 7 N W P 209, *Jagannath Mandhata*, (1897) 1 C. W. N 233, *Madho Swarup* (1915) 13 A L J 691

6 *Julfe Koer* (189-) 19 Mad. p 349 See also *Poomalai Udayan*, (1898) 21 Mad. 296.

7 *Mangobind Muchi*, (1899) 3 C. W N. 627, *Nowrangi Singh*, (1900) 5 C. W N 134; *Bakal*, (1906) 3 A L J 227

8 *Itthan Koran*, (1900) 1 Weir 345.

9 *Allah Baksh*, (1904) P L. R. No. 105 of 1904

10 *Pedal Khalifa*, (1902) 30 Cal 97

11 *Makarpet Narannham v Sub-Inspector of Police*, (1924) 47 M L J 447

order from the latter under s. 160 of the Criminal Procedure Code, assaulted the constable, it was held that the constable was not acting as a public servant engaged in the discharge of his duty, and that, therefore, the accused was not guilty[1].

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was a public servant.

(2) That the accused assaulted, or used criminal force to such public servant.

(3) That when the accused assaulted, etc., him, he was acting in the execution of his duty as such public servant; or

that such assault, etc., was committed with intent to prevent or deter such public servant from discharging his duty, as such; or

that such assault was committed in consequence of something done, or attempted to be done, by such public servant in the lawful discharge of his duty.

Procedure.—*Cognizable—Warrant—Bailable—Not compoundable—Triable* by Presidency Magistrate, or Magistrate of the first or second class.

A person cannot, when called upon to meet a charge that he had assaulted a public officer in the discharge of his duties, on failure of that charge, be convicted of an offence of having assaulted a private individual, viz., a witness in the case, especially in the absence of a complaint by that private individual[2].

Sanction.—A charge under this section requires no sanction for initiation of proceedings[5].

Non-production of a warrant at the trial.—One of the accused was convicted under this section, and two others of abetment of an offence under it. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents. It was held that in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, assaulted [*or* used criminal force to] AB, a public servant, to wit——, in the execution of his duty as such public servant [*or* with intent to prevent or deter the said AB from discharging his duty as such public servant] and thereby committed an offence punishable under s. 353 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force to woman with intent to outrage her modesty.

354. Whoever assaults or uses criminal force to any woman[1], intending to outrage or knowing it to be likely that he will thereby outrage her modesty[2], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

An indecent assault upon a woman is punishable under this section[5]. Rape is punished under s. 376. The offence under this section is of less gravity than the one under s. 376.

1 *Tukaram,* (1918) 20 Cr. L. J. 48.
2 *Akbar Momin,* (1901) 6 C. W. N. 202.
3 *Arjan Pramanick,* (1904) 31 Cal. 664.
4 *Tafazzul Ahmed Chowdhry,* (1899) 26 Cal. 630; *Chunder Coomar Sen,* (1899) 3 C. W. N. 605; *Shwe Ko,* (1905) 3 L. B. R. 128.
5 *Shankar,* (1881) 5 Bom. 403.

Scope.—Assaults committed with the intention of committing rape are not contemplated by this section.

1. 'Woman' is defined as a female human being of any age (s 10) The accused took a girl of six years to his room, where he made her lie down and he lay on her The girl immediately screamed and ran away For this act the accused was convicted and sentenced by the Magistrate under s 352 and not under this section, on the ground that the girl was too young to have any modesty It was held that the act of the accused was punishable under this section, for the girl, though young, was a 'woman' as defined by s 10[1]

2 'Intending to outrage or knowing it to be likely that he will thereby outrage her modesty'.—There must be intention or knowledge that the woman's modesty will be outraged What constitutes an outrage to female modesty is nowhere defined This will differ according to the country and the race to which the woman belongs It would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another A kiss that would be highly resented by a lady might be no affront to the maid[2] To place hands on the shoulder of a woman will be an outrage on the modesty of a Hindu or a Mahomedan woman, but not a European[3]

Knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object For instance, the pulling of a woman by the arm coupled with a request for sexual intercourse amounts to an offence under this section[4] The accused cannot be convicted of this offence where the woman had either no modesty to mention or it was such as would be outraged by the acts attributed to him[5]

CASES.

Where a master took indecent liberties with a female scholar it was held that he was guilty of assault though she did not resist[6] Making a female patient strip naked under the pretence that the accused, a medical man, could not otherwise [illegible]

[illegible]

was asleep therein and sat down on the berth on which she was sleeping She woke up and the accused threatened to strangle her if she screamed He then began to unbutton his trousers and had unfastened the top button when the lady began to struggle with him, whereupon the accused released her and asked her name On discovering her identity, he ceased to molest her explaining that he had mistaken her for another lady It was held that the accused was not guilty of an attempt to commit rape but was guilty of an indecent assault under this section[7] [illegible] where the evidence showed that the accused stripped a girl [illegible] nearly naked and was lying upon her when her cries attracted [illegible] the accused was liable under s 376 for attempt to commit rape and [illegible] this section[10] [illegible] her, but she [illegible] no evidence [illegible]

[1] *Tulsi Mahadev* (1912) 14 Bom L R 9[illegible], 4 Bom Cr C 205.
[2] 1st Rep s 413.
[3] *George Evans* (1900) Criminal Application for Revision No 38 of 1900, decided on April 10 1900 Per Jenkins, C J, and Aston J, (Unrep. Bom)
[4] *Sena Shetty* (18[illegible]) 1 Weir 31[illegible]
[5] *Champa Lime* (1[illegible]) 2[illegible] Cr L J [illegible]
[illegible]

not be convicted of abduction (s. 366) but was guilty of an offence under this section[1].

PRACTICE.

Evidence.—Prove 1 that the person assaulted, etc., was a female.

(2) That the accused assaulted or used criminal force to her.

(3) That he intended thereby to outrage her modesty; or that he knew it to be likely that he would thereby outrage her modesty.

The charge under this section is one which is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence besides that of the woman herself, or is corroborated by her conduct and the surrounding circumstances and is consistent with ordinary probabilities[2].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted [*or* used criminal *force to*] AB, *a woman, intending to outrage* [*or knowing it to be likely that you* would thereby outrage] the modesty of the said AB by such assault [*or* criminal force], and thereby committed an offence under s. 354 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—See the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2).

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation[1] given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The intention to dishonour may be supposed to exist when the assault or criminal force is by means of gross insults, such as kicking a man, pulling a man's nose, assaulting with a shoe, or laying a whip across the shoulders.

Where an accused, while under trial, struck a Sub-Inspector of Police, who was in the witness-box giving evidence against him, it was held that he was guilty of an offence under this section[3].

1. 'Grave and sudden provocation'.—See exception 1 to s. 300.

Pollution caused by a stream water splashed by a low caste woman on the body of an orthodox Brahmin while he was performing his *sandhya* (morning prayer) and interruption thus caused in the continuity of his prayers are sufficient to cause grave and sudden provocation so as to justify the use of force such as catching her in order to express his resent at her conduct, and there can be no inference from such action that there was an intention on the part of the Brahmin to dishonour the woman[4].

1 *Fakir*, (1928) 29 P. L. R. 444, 10 L. L. J. 325.

2 *Nga Aung Dwe*, (1894) 1 U. B. R. (1892-1896) 229.

3 *Altaf Mian*, (1907) 27 A. W. N. 186.

4 *Sheodin Hari Prasad* v. *Juwni*, (1926) 27 Cr. L. J. 1003.

Evidence.—Prove (1) the assault or use of criminal force by the accused

(2) That the accused intended thereby to dishonour the person assaulted, etc

(3) That he did not receive grave or sudden provocation from the person so assaulted, etc

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, assaulted [*or* used criminal force to AB, intending by such assault [*or* criminal force] to dishonour the said AB, and thereby committed an offence punishable under s 355 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Assault or criminal force in attempt to commit theft of property carried by a person

356 Whoever assaults or uses criminal force to any person, in attempting[1] to commit theft[2] on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

COMMENT

Object.—This section applies to cases of using criminal force in an attempt to commit theft and not to those cases in which theft has been actually committed[1] It provides a separate punishment for the rare cases of criminal force used in an attempt to commit theft, and yet not amounting to robbery The section will generally apply to pickpockets

1. **'Attempting'.**—See s 511, *infra*

2. **'Theft'.**—See s 378, *infra*

PRACTICE

Evidence —Prove (1) the assault or use of criminal force by the accused

(2) That the person assaulted, etc, at the time, was wearing, or carrying the property in question

(3) That the accused committed such assault, etc, in attempting to commit theft of such property (*vide* ss 511 and 378)

Procedure —Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, assaulted [*or* used criminal force to] AB in attempting to commit theft of certain property, to wit——, which the said AB was then wearing [*or* carrying], and thereby committed an offence punishable under s 356 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

[1] *Malan* (1865) Unrep Cr C. 3.

Assault or criminal force in attempt wrongfully to confine a person.

357. Whoever assaults or uses criminal force to any person, in attempting[1] wrongfully to confine[2] that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section deals with an assault committed in attempting wrongfully to confine a person.

1. **'Attempting'.**—See s. 511, *infra*.

2. **'Wrongfully to confine'.**—See s. 340, *supra*.

PRACTICE.

Evidence.—Prove (1) the assault, or use of criminal force by the accused. (2) That he did so in an attempt to wrongfully confine the person assaulted, etc.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted (*or* used criminal force to) AB, in attempting wrongfully to confine the said AB, and thereby committed an offence punishable under s. 357 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force on grave provocation.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.—The last section is subject to the same explanation as section 352.

COMMENT.

This is a somewhat mitigated form of the offence described in s. 352.

The explanation is not happily worded. The expression 'the last section' is incorrect. The purport of the explanation is that this section is subject to the same explanation as s. 352.

PRACTICE.

Procedure.—Not cognizable—summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Of Kidnapping, Abduction, Slavery and Forced Labour.

359. Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship.

COMMENT.

Kidnapping is divided into two kinds But there may be cases in which the two kinds overlap each other For instance, a minor may be kidnapped from British India as well as from lawful guardianship

360. Whoever conveys any person beyond the limits of British India[1] without the consent of that person[2], or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

Kidnapping from British India

COMMENT

The offence of kidnapping is sometimes committed by means of assault, and is sometimes attended with restraint, but this is not always the case For instance, a labourer who has been induced to embark on board a ship by false assurances that he shall be taken to a country where he shall have good wages, but whom the captain of the ship intends to sell for a slave has not as yet been either assaulted or retained although he is kidnapped

Ingredients [illegible]

1. **'Conveys any person beyond the limits of British India'.**—This offence may be committed on a grown up person or a minor by conveying him or her beyond the limits of 'British India'

See s 15, *supra*, as to the definition of 'British India'

2. **'Without the consent of that person'.**—The conveying must be without the consent, express or implied, of the person conveyed Where the accused induced certain women to leave British India for Ceylon on the misrepresentation that they were to be married to his sons, and after arriving at Ceylon made them work as coolies on a tea estate, it was held that the women must be held to have been taken without their consent and that the accused was guilty of kidnapping from British India[1].

A person kidnapping a girl of fifteen years of age out of British India with her consent does not come within the purview of this section[2].

See s 90, *supra*, as to the definition of 'consent'

361. Whoever takes or entices any minor[1] under fourteen years of age, if a male, or under sixteen years of age, if a female[2], or any person of unsound mind, out of the keeping of the lawful guardian[3] of such minor or person of unsound mind, without the consent of such guardian[4], is said to kidnap such minor or person from lawful guardianship.

Kidnapping from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an

[1] *Perumal Kangani*, (1910) 8 M. L. T. 21, (1910) M W N 262.

[2] *Harilal Dala*, 20 Bom L. R. 372.

illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

COMMENT.

Object.—The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.

Under English law this offence is known as 'child-stealing'.

Scope.—Kidnapping is an offence irrespective of any intent with which it is committed. It may be committed without assault or wrongful restraint or confinement. A child, for example, who is decoyed from its guardian, who soon forgets its home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. This offence may be committed in respect of either a minor or a person of unsound mind. To kidnap a grown up person, therefore, is not this offence[1].

Ingredients.—The section has four essentials—

1. Taking or enticing away a minor or a person of unsound mind.
2. Such minor must be under fourteen years of age, if a male, or under sixteen years of age, if a female.
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
4. Such taking or enticing must be without the consent of such guardian.

1. 'Takes or entices any minor...or person of unsound mind'.—The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not[2]. There must be a taking of the child out of the possession of the parent. If a child leaves its parents' house for a particular purpose with their consent, it cannot be said to be out of the parent's keeping. A mere leading of a not unwilling child will be sufficient.

The word "taking" means physical taking. Thus, where a father sent his daughter to live in a house with another married daughter of his, who got her married to an inmate of the house without the consent of the father, it was held that no offence was committed by the married daughter, because there was no taking out of lawful guardianship inasmuch as the daughter never left the house where she was residing with the consent of her father[3].

The period of detention is immaterial to the offence. Where, therefore, it was proved that the accused having met a girl by arrangement, stayed with her away from her father's house for three days, sleeping with her at night; and that he took her away without her father's consent and against his will, in order to gratify his passions and then allowed her to return home, but not with a view of keeping her away from her home permanently, it was held that he was guilty of this offence[4]. If a girl under sixteen has been found in the streets by herself and seduced away, that is not a taking out of the possession of the father, even though he is living in the place and she lives with him[5]. If a man, by previous promises to a girl as to what he will do if she will leave her parents' house and go to live with him, induces her at length to do so, and then receives and harbours her secretly, he is guilty of taking her out of the possession of her parents[6].

1 (1867) 6 W. R. (Cr. L.) 11.

2 *Manktelow*, (1853) 6 Cox 143.

3 *Jagan Nath*, (1914) 15 Cr. L. J. 630. See *Jagannadha Rao* v. *Kamaraju*, (1900) 24 Mad. 284.

4 *Timmins*, (1860) 8 Cox 401; *Baillie*, (1859) 8 Cox 238. But see *Hibbert*, (1869) L. R. 1 C. C. R. 184.

5 *Green*, (1862) 3 F. & F. 274, followed in *Hibbert*, (1869) L. R. 1 C. C. R. 184; *Primelt*, (1858) 1 F. & F. 50.

6 *Robb*, (1864) 4 F. & F. 59; *George Kipps*, (1850) 4 Cox 167.

It is not necessary to show a trespass or anything of that nature in the taking, [illegible]

[illegible] blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away It is, however, equally clear [illegible] leaves her father's house, although he [illegible] avails himself of that leaving which t[illegible] be a taking her out of her father's possession, because the persuasion would be the motive cause of her leaving Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave'[2]

If the suggestion to go away with the accused came from the girl only, and he took the merely passive part of yielding to such suggestion, he is entitled to an acquittal[3]

'When taking is [illegible] urt has decided that the offen[illegible] when the minor is actually [illegible] e continuing so long as the minor is kept out of such guardianship The act of taking is not, in the proper sense of the term, a continuous act, when once the boy or girl [illegible]

[illegible] her there for twenty days, and subsequently clandestinely removed her to the house of the accused, and from that house the accused and M took her through different places to Calcutta It was held that the taking away out of the guardianship of the husband was complete before the accused joined the principal offender in taking the girl to Calcutta, and that the accused, therefore, could not be convicted under s 363[5]

The Madras High Court is of opinion that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted[6] In the above Calcutta case this ruling has been distinguished on the ground that this was a case of kidnapping out of British India and, as, when the accused in this case intervened, the minor had not been actually taken out of British India, the process of taking was regarded as still going on, or continuing In a latter case the ruling in the above-mentioned Calcutta case has been approved of[7]

The Allahabad High Court has laid down that the offence of kidnapping [illegible]

There can be no abetment of this offence in such a case on the hypothesis that the offence is a continuing one[8]. But if there is a conspiracy before the kidnapping takes place, a conviction for abetment of kidnapping can be sustained[10].

[1] [illegible]
[2] [illegible] 2 401
[3] [illegible] See
[illegible]
[4] [illegible] H, F B
[5] Ibid
[6] Samsa Kavandan, (1870) 1 Mad 173
[7] Chekutty, (1902) 26 Mad 454
[8] Ram Das, (1896) 18 All 350; Ram Sundar, (1896) 19 All 109
[9] Abdur Rahman, (1916) 38 All. 664, followed in Gokaran, (1920) 24 O. C. 329.
[10] Tika, (19[illegible]) [illegible] All

The Patna High Court has adopted the view of the Calcutta High Court and has held that kidnapping is not a continuing offence and the act of kidnapping is complete as soon as the minor is taken out of the keeping of the lawful guardianship. While the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian, he was held guilty under s. 363 read with s. 114. The question whether the act of kidnapping was complete or not is a question of fact which must be decided on the evidence of each particular case[1]. Where one L enticed a minor girl to come out of a *gachhi* to the road and then to the motor car in which R was sitting so that the latter might drive away with her, it was held that the offence of kidnapping was complete only when R drove away with her[2].

The former Chief Court of the Punjab took the same view as the Calcutta and Allahabad High Courts. It held that there could be no abetment of kidnapping by conduct, which commenced only after the minor had once been completely taken out of the keeping of the guardian and the guardian's keeping of the minor was consequently at an end, the question whether such taking was or was not complete being one for determination with reference to the circumstances proved in the particular case[3]. Speaking generally, the keeping of the guardian will be at an end when the person of the minor has been transferred from the custody of the guardian or some person on his behalf into the custody of some person not entitled to the custody of the minor[4]. The offence of kidnapping not being a continuing one there could be no abetment of the taking after the minor had once been completely taken out of the keeping of her lawful guardian[5].

Taking away in good faith is not kidnapping.—Where the mother in good faith believed that she was entitled to the custody of her own minor children a conviction for kidnapping them from the guardianship of their father was set aside[6]. A husband cannot be convicted of kidnapping his own wife when he believes in good faith that he has the right of personal custody of his wife[7].

'Enticing' is an act of the accused by which the person kidnapped is induced of his or her own accord to go to the kidnapper. It is not necessary that the taking or enticing should be shown to have been by means of force or fraud[8]. For instance, the enticing away of a child playing on a public road is sufficient[9].

'Minor'.—This word includes married as well as unmarried female minors[10]. According to Mahomedan law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of this section regard must be had only to the definition of minority in s. 3, Indian Majority Act[11].

2. **'Under sixteen years of age'.**—Where the minor kidnapped is a girl under sixteen years of age, it is no defence that the accused did not know the girl to be under sixteen, or that from her appearance he might have thought she was of a greater age[12]. Any one dealing with such a girl does so at his peril, and if she turns out to be under sixteen he must take the consequences[13]; even though he bona fide believed and had reasonable ground for believing that she was over sixteen[14].

1 *Nanhak Sao*, (1926) 5 Pat 536.
2 *Rekha Rai*, (1927) 6 Pat. 471.
3 *Chanda*, (1892) P. R. No. 6 of 1894; *Muhammad Bakhsh*, (1892) P. R. No. 8 of 1894.
4 *Gurdit Singh*, (1916) P. W. R. No. 25 of 1916, P. L. R. No. 55 of 1916.
5 *Durga Das*, (1904) P. R. No. 13 of 1904.
6 *Howka Ramalakshmi*, (1886) 1 Weir 208; *John Tinkler*, (1859) 1 F. & F. 513.
7 *Askur*, (1864) W. R. (Gap. No.) (Cr.) 12.
8 *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5; *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Singh*, (1865) 3 W. R. (Cr.) 15; *Abdul Sattar*, (1927) 29 Cr. L. J. 635.
9 *Mussamut Oozeerun*, (1867) 7 W. R. (Cr.) 62 [98].
10 *Kammu*, (1878) P. R. No. 12 of 1879.
11 *Muthu Ibrahi*, (1913) 37 Mad. 567.
12 *Robins*, (1844) 1 C. & K. 456; *Krishna Maharana*, [1929] Cr. C. (Pat.) 379.
13 *Christian Olifier*, (1866) 10 Cox 402; *Mycock*, (1871) 12 Cox 28.
14 *Prince*, (1875) L. R. 2 C. C. R. 154.

3. **'Out of the keeping of the lawful guardian'**—"The Legislature has advisedly preferred this phrase to the word 'possession' which frequently recurs in the Code—in connection with inanimate objects The word 'keeping'...connotes the fact that it is compatible with independence of action and movement in the object kept It implies neither prehension nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising And this relation between the minor and the guardian is.. certainly not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of its operation"[1] The expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused [illegible] going out of the keep- [illegible] he person would not [illegible] A girl under sixteen [illegible] On her way she met [illegible] pany her under a promise of obtaining work for her The woman took the girl to her house and kept her there till evening, when she was removed by accused No 2 to a bungalow and kept there for two days after which she was allowed to return to her home It was held that the relation between the minor and the guardian was not dissolved at the time when accused No 1 met the minor in the market, and that the accused [illegible]

[illegible] with her mother in law, left her husband's home to go to her maternal uncle On the way she was induced by K to accompany him and he deceitfully took her to a [illegible] iations were set [illegible] her identity to [illegible] er to the police [illegible] police she lived for a month at his place It [illegible] idnapping, inasmuch as although the girl left [illegible] cease to be under the guardianship of the husband, her lawful guardian, but that K's brother was not guilty of any offence as he had done nothing in furtherance of a common intention[5] A *jat* girl under sixteen years of age was ordered by her father to take food to the bullocks As she was coming home, one of the accused came to her and persuaded her to accompany him Her hair was cut and she was dressed in boy's clothes She lived for sometime with both the accused After this both the accused were taking away the girl when they were discovered [illegible] the *chowkidar* that she was a girl and no [illegible] accused It was held that the accused [illegible] the girl from the lawful guardianship of her father without his consent[6]

There must be a taking or enticing of a child out of the keeping of the lawful guardian Where, therefore, a girl runs away from home in consequence of ill treatment, and on meeting the accused on the road, agrees to take service as a cooly and goes with him, this offence is not committed[1] Similarly, where a girl was driven away from her parental roof and was found some days

[1] Per Batty and Aston JJ, in *Jetha Nathoo*, (1901) 6 Bom L R 780, 788, *Karam Singh* (1916) 14 A L J 792.

[2] *[illegible]*, (1927) 54 M L J 456, 29 Cr L J 63.

[3] *Jetha Nathoo*, (1901) 6 Bom L R 785, *[illegible]*, (1914) 8 S L R 182, *[illegible]* (1912) 6 S L R 71

[4] *[illegible] Sher Than*, (1907) 1 U B R (1907-1909) (P C) 1

[5] *Karam Singh* (1916) 14 A L J 792.

[6] *Harkesh* (1918) 40 All 507

[1] *[illegible]* (1875) 4 W. R. (Cr) 6.

from her master to go and see her parents from Sunday to Monday night, and went to see them on the Sunday for a few hours only, and then told them that she was going back to her employment, instead of which she remained with the accused all [illegible]

tance from her father's home, it was held that she was under the lawful charge of her employer, and not in the possession of her father[3]

[illegible]

In the case of a grown up person of unsound mind there must be evidence of some kind of persuasion or moral force as a result of which he was taken out of the protection of his guardian[4]

'Lawful guardian'.—The word 'lawful' does not necessarily mean that the person who entrusts a minor to the care or custody of another must stand in the position of a person having a legal duty or obligation to the minor It is a sufficient [illegible] minor to [illegible] unlawful [illegible] rds is in [illegible] in being bound to [illegible] e care the minor had [illegible] eaning of the legal [illegible] guardian of his sister aged sixteen when the parents are dead[5] But it must be shown that the minor was abducted from lawful guardianship, and lawful guardianship is the guardianship of a person who is lawfully entrusted with the care or custody of the minor A gir of fourteen years, being left an orphan, accompanied a woman to a town where they lived by begging and selling grass She was persuaded by a man G to depart [illegible] care or custody of her[6]

"The explanation is not intended to limit the protection which the section gives to parents and minors It is intended to extend that protection by including in the term lawful guardian' any person lawfully entrusted with the care or custody of the minor The fact that a father allows his child to be in the custody [illegible] time, cannot ..deter- [illegible] for the purposes of the [illegible] l see whether they are consistent or not with the continuance of the father's legal possession of the minor. If they are not inconsistent, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be tem-

[1] *Miller*, (1876) 13 Cox 179
[2] *Henkers* (1886) 16 Cox 257
[3] *Umedbaksh* (1878) 3 Bom 178
[4] *Harlow* (1879) P R. No 7 of 1880, *Fkadi Bakhsh*, (1887) P R No 27 of 1887
[5] *Abdul Kayum Mama* [illegible] (Unrep. Bom).
Criminal Appeal No. 86 of 1913, decided on Ma[illegible]
[6] [illegible]

husband, until the girl attained the age of puberty[1]. S, a Mahomedan married girl under sixteen years of age, who had attained puberty, was taken away from her mother's house with whom she was living (her father being dead) by the respondents. The Magistrate convicted the accused under ss. 366 and 368. On appeal, the Sessions Judge quashed the conviction on the ground that as under Mahomedan law a mother could be a guardian only until her daughter attained puberty or completed her fifteenth year, S had become *sui juris* and that therefore the accused had not kidnapped her from lawful guardianship. On an appeal being preferred by Government against the acquittal, it was held that the mother of the girl was her lawful guardian within the terms of this section; and that the accused had been rightly convicted of the charge of kidnapping S from the guardianship of her mother[2].

A brother of eighteen years of age is lawful guardian of a girl whose parents are dead and who is under sixteen years of age[3].

The husband becomes the guardian of his wife after she attains puberty[4]. The husband is not the lawful guardian of her person before puberty. In the absence of any evidence that a lawful guardian entrusted the custody of a Mahomedan minor girl to her husband, a person cannot be convicted for kidnapping her from the custody of her husband. Where the maternal uncle of a minor girl carried her away from her husband's house by force, it was held that, in the absence of evidence to prove that the husband was lawfully entrusted with the care and custody of the girl, the maternal uncle had committed no offence[5].

The mother is the natural guardian of her illegitimate children.

Other nationalities.—There is no law under which among Native Christians a father has a preferential right to the custody of his children to the mother and, therefore, the removal of her children by the mother from the house occupied by their father does not amount to an offence under this section[6]. Where on an application by the husband for divorce the District Judge made a decree *nisi* for dissolution of marriage and also directed the wife to deliver up to the husband the son born of the marriage, and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son, but before the confirmation of the decree by the High Court the wife removed the boy from the father's custody and was charged for kidnapping, it was held that the order for custody which was made was an order *nisi* without legal effect until confirmed by the High Court and the wife had committed no offence in removing the boy from the father's custody[7].

In the case of illegitimate children, under the English law, neither the father nor the mother has a preferential right. During the period of nurture the mother would naturally be preferred[8], but after that period the putative father would have the preference[9].

4. **'Without the consent of such guardian'**—The consent of the minor is immaterial[10].

Consent given by the guardian after the commission of the offence would be of no avail. Where a temporary guardian is proved to have been in collusion with the other party, and the taking away is accomplished in consequence of such

1 *Korban*, (1904) 32 Cal. 444.
2 *Miran Bakhsh*, (1905) P. R. No. 60 of 1905.
3 *Mehr Hussain*, [1929] Cr. C. (Lah.) 563.
4 *Nur Kadir* v. *Zuleikha Bibi*, (1885) 11 Cal. 649; *Wazeer Ali* v. *Kaim Ali*, (1873) 5 N. W. P. 196.
5 *Derajuddin Akanda*, (1923) 27 C. W. N. 531, 37 C. L. J. 329.
6 *Peter*, (1927) 28 Cr. L. J. 513.
7 *Borthwick* v. *Borthwick*, (1913) 41 Cal. 164.
8 *Pemantle*, (1882) 8 Cal. 971; *Barnardo* v. *McHugh*, [1891] A. C. 388.
9 *Nash*, (1883) 10 Q. B. D. 454.
10 *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5; *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Singh*, (1865) 3 W. R. (Cr.) 15; *Sookee*, (1867) 7 W. R. (Cr.) 36 [54]; *Gooroodoss Rajbunsee*, (1865) 4 W. R. (Cr.) 7; *Mussammat Soma*, (1916) P. R. No. 17 of 1916; *Wali Muhammad*, (1926) 27 Cr. L. J. 1018; *Bhagwati Prasad*, (1929) 119 I. C. 14.

collusion, there could be no such consent of the lawful guardian as the section requires[1]. The English Courts have held that by the fraud of the temporary guardian the right to possession of the child reverts to its natural guardian[2].

A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of s 90, and as such is not useful as a consent under this section A misrepresentation as to the intention of a person is a misrepresentation of a fact[3]. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping[4]

If a man by false and fraudulent representations induce the parents of a girl to allow him to take her away, such taking will amount to kidnapping[5]. But where a mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out

she was taken away for a day by

could not be said to have happ

minor went to the house of a mutual friend and had sexual intercourse with the accused, she having previously had sexual intercourse with the accused in the presence and with the consent of her guardian, her mother, in her mother's house, it was held that the accused could not be convicted of kidnapping as there was no taking of the minor, and even if there was a constructive taking, as the mother was proved to have connived at the seduction of her daughter, there was reason to believe that the subsequent taking was effected with her consent[7]

of kidnapping. It is essential in terms of the section that the minor should be taken or entic ... e minor 'without the consent o ... ie section has no application ... consideration or

neither B nor C was guilty of kidnapping[9].

Marrying a girl without the consent of her 'lawful guardian'.—Where the mother had assigned by a will the guardianship of her minor daughter, and the ... the daughter removed her by ... to a person other than the ... relative had been guilty of ... a Hindu woman left her husband's house, ... went to the house of A, and on the same ... brother of A, without the father's consent,

1 *Ganesh*, (1909) 31 All 448

2 See Roscoe, 14th Edn., p. 258.

3 *Jakidu*, (1911) 36 Mad 453; *Mussammat Sona*, (1916) P. R. No. 17 of 1916.

4 *Ibid*

5 *James Hopkins*, (1842) Car & M. 254

6 *Primelt*, (1858) 1 F. & F. 50.

7 *Abdul Rahman*, (1912) U. B. R. 136.

8 *Jafir Aaiyer*, (1923) 10 P. L. T. 226, 119 I. C. 72.

9 *Bai Makaler*, (1895) Cr. R. No. 64 of 1895, Unrep. Cr. C. 820

it was held that A had committed an offence, under ss. 109 and 363, of abetting the offence of kidnapping[1]. Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles, after having lived for eighteen months with the maternal uncles, was forcibly carried away by her paternal uncles and was given in marriage, it was held that the paternal uncles were guilty of kidnapping[2].

Where a person carried off, without the consent of her father, a girl to whom he was betrothed by her father, because the father suddenly changed his mind and broke off the marriage, it was held that he was guilty of kidnapping[3].

Abduction.

362. Whoever by force compels, or by any deceitful means induces[1], any person to go from any place[2], is said to abduct that person.

COMMENT.

This section merely gives a definition of the word 'abduction', which occurs in some of the penal provisions which follow. There is no such offence as abduction under the Code, but abduction with certain intent is an offence[4].

Ingredients.—The section requires two essentials—

1. Forceful compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be the going of a person from any place.

1. 'Whoever by force compels, or by any deceitful means induces'.—Where no force or deceit is practised on the person abducted, a conviction cannot stand[5]. The force or fraud must have been practised upon the person[6].

An orphan girl about seventeen years of age was brought up by A as his own daughter. The accused, A's neighbour, induced her to leave home on the pretext that he would either marry her himself or get her married. He did neither but debauched her himself and handed her over to a friend of his who also proceeded to have connection with her. It was held that the expression 'deceitful means' is wide enough to include the inducing of a girl to leave her guardian's house by means of a representation that the person to whom she went would either marry her himself or arrange for her marriage and that the accused was guilty of this offence[7].

2. 'Any person to go from any place'.—The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another[8]. Accused came on to the roof of a house where a woman was sleeping. Waking her up they asked her to accompany them. She refused and they lifted her up in order to carry her away, whereupon she raised an alarm, and the accused dropped her on the roof and made good their escape. It was held that the accused were not guilty of abduction, inasmuch as the woman was not compelled to go from the place where she was, but was merely lifted up and was dropped down again, but that the action of the accused amounted to an attempt to abduct and that they were, therefore, guilty of an offence under this section and s. 511[9].

Abduction and kidnapping.—'Abduction' differs from 'kidnapping' because there may be abduction without a removal of the person from the protection of the law, or even from lawful guardianship. It differs from kidnapping as regards the element of force or fraud existing in it.

1 *Prankrishna Surma*, (1882) 8 Cal. 969.
2 *Baij Nath*, (1914) 15 Cr. L. J. 640.
3 *Gooroodoss Rajbunsee*, (1865) 4 W. R. (Cr.) 7; *Modhoo Paul*, (1865) 3 W. R. (Cr.) 9.
4 *Bidhoomookhee Dabee* v. *Sreenath Haldar*, (1870) 15 W. R. (Cr.) 4, 6 Beng. L. R. App. 129; *Ganga Dei*, (1914) 12 A. L. J. 91.
5 *Komul Dass*, (1865) 2 W. R. (Cr.) 7.
6 *Barrett*, (1885) 15 Cox 658.
7 *Mahbub*, (1907) 27 A. W. N. 199.
8 *Ganga Dei*, sup.
9 *Allu*, (1925) 26 Cr. L.J. 943, 26 P.L.R. 119.

Abetment.—A married woman cannot abet her own abduction as herein defined[1].

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for kidnapping

COMMENT.

This section specifies the punishment for the offences defined in ss. 360 and 361.

PRACTICE

Evidence.—For kidnapping from British India prove—

(1) That the person in question was at the time of the offence in British India.

(2) That the accused conveyed that person beyond the limits of British India.

(3) That he did so without the consent of that person, or of some person legally authorised to consent on that person's behalf.

For kidnapping from guardianship prove—

(1) That the person in question was at the time of the offence a minor under fourteen years of age (if a male), or under sixteen years of age (if a female), or that such person was of unsound mind.

Where in a case under this section the Magistrate finds that there is prima [illegible] girl was enticed away he should not be [illegible] was not proved to be under sixteen, but [illegible] whether the accused can be charged with an offence under s. 366 or some other cognate offence against a female of over sixteen[2].

(2) That such minor, or person of unsound mind, was, at the time, lawfully entrusted to the keeping of a guardian.

(3) That the accused took or enticed such minor, or person of unsound mind, out of such keeping[3].

(4) *That he so took or enticed, etc., without the consent of such guardian.*

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Jurisdiction.—A subject of a Native State, though not amenable to the [illegible] out of British territories, [illegible] territories[4]. This view [illegible] a continuing offence [illegible] charged with having committed the offence of kidnapping in Moyurbhunj, which is outside British India, cannot be tried by a Court in British India within the local limits of whose jurisdiction the person kidnapped may be conveyed or concealed or detained[5].

[1] *Natha Singh*, (1883) P. R. No. 11 of 1883.

[2] *Dharam Singh*, (1924) 6 L. L. J. 318.

[3] *Nelu Lee*, (1868) 10 W. R. (Cr.) 33; *Mohim Chunder Nil*, (1871) 16 W. R. (Cr.) 42.

[4] *Dhurmonarain Modra*, (1864) 1 W. R. (Cr.) 39.

[5] *Bhuta Sastal v. Dama Sen*, (1915) 20 C. W. N. 62; [illegible], (1917 [illegible] R. 17.

The offence of kidnapping may be tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained[1].

Magistrates should not give themselves jurisdiction by trying cases under s. 363 which really fall under s. 366. The form of kidnapping which is punishable by s. 366 is a seriously aggravated form, which only Sessions Courts and the District Magistrates in the exercise of their special powers have jurisdiction to try[2].

Sections 346 and 363.—Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, and goes to form part of that offence, and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence and should not form the subject of a separate conviction and sentence[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped AB [a female minor under——years] from British India [*or* from lawful guardianship of CD, her——], and thereby committed an offence punishable under s. 363 of the Indian Penal Code, and within my cognizance [*or cognizance of the Court of Session* (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[4].

Punishment.—The maximum sentence prescribed for this offence should only be awarded in a case of the most aggravated nature[5]. See the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2).

Kidnapping or abducting in order to murder.

364. Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(*b*) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

COMMENT.

This section provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kidnapper is to hold the kidnapped person to ransom. In such a case the kidnapper can be convicted properly either under s. 363 or s. 365 of the Code[6].

1 The Criminal Procedure Code, s. 181 (4). This section as framed now by Act V of 1898 settles the conflict of opinion existing between several High Courts. See *Thaku*, (1884) 8 Bom. 312; *James Ingle*, (1891) 16 Bom. 200; *Ram Dei*, (1896) 18 All. 350; *Surja*, (1883) 13 A. W. N. 164; *Abbi Reddi*, (1894) 17 Mad. 402; *Jaimal Singh*, (1900) P. R. No. 1 of 1901.

2 *Nga Po Saw*, (1901) 1 U. B. R. (1897-1901) 328.

3 *Mungroo and Puttroo*, (1874) 6 N. W. P. 293.

4 (1866) 5 W. R. (Cr. L.) 1; (1867) 18 W. R. (Cr. L.) 11.

5 *Mussamut Bhoodeea*, (1867) 8 W. R. (Cr.) 3.

6 *Samundar*, (1923) 27 Cr. L. J. 64.

PRACTICE.

Evidence—Prove (1) the kidnapping by the accused[1].

(2) That he so kidnapped the person in question in order (a) that such person might be murdered, or (b) that such person might be so disposed of, as to be put in danger of being murdered

Or prove for abduction

(1) That the accused compelled the person to go from the place in question

(2) That he so compelled that person by means of force, or that he induced that person to do so by deceitful means

(3) That he so abducted the person in question in order that (a) such person might be murdered, or (b) such person might be so disposed of as to be put in danger of being murdered

Procedure.—Cognizable Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows

That you, on or about the day of—, at—, kidnapped [*or* abducted] [illegible]

Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

365 Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting with intent secretly and wrongfully to confine person

COMMENT.

This section lays down the same penalty as s 363, but it punishes abduction [illegible] n intention to confine a person secretly [illegible] ung in broad daylight without any [illegible]

Where a person was abducted in order that he might be held to ransom by his abductors, it *was held that this section was applicable*[4]

The accused abducted a girl B in order to put pressure upon her friends to restore another girl whom they had abducted She was restored a few days after B was abducted and then B was also released It was not found that any harm was done to B It was held that under such circumstances heavy sentences of imprisonment were not necessary[5]

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused[6], or abduction by him[7].

(2) That the accused thereby intended that the person kidnapped or abducted should be kept in wrongful or secret confinement.

1 *Vide* s 363 sup

2 *Albar Ali*, (1923) 7 L. L. J 320 26 P L. R. 731

3 *Indir Sin* [illegible] (1927) 29 Cr L J [illegible] (1923) 27 Cr L J 61

4 *Re Lan*, (1912) 6 L. B R 100 [illegible]

5 *Barn*, (1916) P. L. R. No. 89 of 1916

6 *Vide* s 363, sup.

7 *Vide* (1) and (2) s. 364 sup.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Conviction under s. 452 no bar to a subsequent trial under this section.—One Merai Kurmi formed intimacy with one Mussammat Hulla, a widow, and Hulla took up her abode in Merai's house. Some of Hulla's relations attacked the house of Merai, beat him and his brothers, and carried off Hulla. For this they were tried and convicted under s. 452 of the Code. After being removed from Merai's house, Hulla disappeared, and, after all efforts to find her had been unavailing for a space of some two years, the persons who had been concerned in the attack on Merai's house were put on their trial under this section. It was held that their previous conviction under s. 452 was no bar to their being tried under this section[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped (*or* abducted) one XY with intent to cause the said XY to be secretly and wrongfully confined, and thereby committed an offence punishable under s. 365 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

Kidnapping or abducting woman to compel her marriage, etc.

366. Whoever kidnaps or abducts any woman[1] with intent that she may be compelled, or knowing it to be likely that she will be compelled[2], to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse[3], or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

COMMENT.

The offence under this section is merely an aggravated form of the offence under s. 363 and the same person cannot be convicted on the same facts under both the sections[3]. An intention to seduce subsequent to the elopement is an essential part of this offence.

Scope.—The former Chief Courts of Lower Burma and the Punjab held that this section did not apply to a case in which a minor girl, at the time of the kidnapping from lawful guardian, intended to cohabit of her own free will with the kidnapper[3]. It applied where she was compelled to marry a person against her will or where she was forced or seduced to illicit intercourse. But the Calcutta High Court is of opinion that the offence of kidnapping a minor girl, in order that she

1 *Baldeo Prasad*, (1906) 26 A. W. N. 32.
2 *Isree Panday*, (1867) 7 W. R. (Cr.) 56
3 *Nga Chan Mya*, (1902) 1 L. B. R. 297; *Nga Nge*, (1905) 11 Burma L. R. 326, U. B. R. (P. C.) 17; *Durga Das*, (1904) P. R. No. 13 of 1904.

may be seduced to illicit intercourse is established by the accused taking her from lawful guardianship, with such object, although she left home with the intention of having illicit intercourse with him Sanderson, C J, observed 'It is further conceded that the offence dealt with by section 366 is merely an aggravated form of the offence created by s 363, and it would, therefore, seem to follow that when the matter under consideration, in relation to section 366, is the seduction to illicit intercourse of a girl under sixteen years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under s 363 One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience'[1] It is not necessary to show that after the first act of abduction or kidnapping of the girl there was another act of seduction of the girl to illicit intercourse where from the proximity of events the Court is satisfied that the effect of the inducement which was the cause of abduction continued till the time of illicit intercourse[2]

Ingredients This section requires—

1 Kidnapping or abducting any woman

2 Such kidnapping or abducting must be

(a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or

(b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse

The second part of the section requires two things

(1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place

(2) Such going must be with intent that she may be, or with knowledge that it is likely that she will be forced or seduced to illicit intercourse with some person

1. 'Kidnaps or abducts any woman'.—See s 10 as to the definition of 'woman The word 'woman includes a minor female[3]

It is not necessary that the accused should know definitely who the guardian of a minor girl is whom he finds wandering about and makes use of for his own ends[4]

2. 'With intent that she may be compelled to marry against her will, etc'.— This section makes use of the words compelled, or knowing it to be likely that she will be compelled If, therefore, a woman is not compelled to do the acts specified in the section no offence under this section is committed Where a procuress induced a married woman of twenty years of age to become a prostitute, and the facts showed that she made a deliberate choice to go to Calcutta, and become a prostitute it was held that the procuress could not be convicted under this section because the woman was not compelled to go, nor was she forced or seduced to illicit intercourse but that she could properly be convicted under s 498, because, whatever the woman's secret inclinations were, she would have had no opportunity of carrying them out but for the accused[5] Where certain persons conspired together to induce by deceitful means a girl of eighteen to leave her home and accompany them to a certain place with the intention of handing her over to the accused, and there on the refusal of the girl to accept the company of the accused, the latter caught hold of her hand and dragged her, it was held that the accused was guilty of abduction under this section[6] A Mahomedan girl of ten or eleven years of age was handed over by her mother to the accused and

[1] Sajjan [illegible] (1922) 49 Cal [illegible]
[2] Tofail (1927) 28 Cr L J 413
[3] Dhiraj Singh v. Hurnam [illegible] (1877) [illegible] P R No 8 of 1878
[4] [illegible] (1923) 27 O C 32, Mal[illegible] (1914) [illegible] L R [illegible] 82
[5] [illegible] (1911) [illegible] W R (Cr) 45
[6] [illegible] Singh (1[illegible]) [illegible] W N

the mother consented to the marriage of the accused with her daughter. The marriage was performed but the girl did not consent to it, as she was not capable of giving her consent, nor had the consent of her brother been obtained who was her guardian for marriage under the Mahomedan law. It was held that the accused was guilty of an offence under this section[1]. Accused, who were near paternal relations of a girl over sixteen years of age, and were admittedly entitled to her custody as against her mother with whom she was living, carried her away forcibly in order to marry her to one of themselves. It was held that the accused were guilty of an offence under this section[2]. Where a Hindu mother-in-law forced her minor daughter-in-law to marry a person against her will, it was held that she was guilty of an offence under this section[3].

The section requires a special intent or knowledge. Such intent could not be presumed in the case of a young girl of thirteen years[4].

If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping[5].

The word 'marry' implies going through a form of marriage whether the same is in fact valid or not[6].

3. **'Forced or seduced to illicit intercourse'.**—There must be forcing or seducing for the purpose of illicit intercourse in order that an offence under this part of the section is committed. Where the accused attacked another person and dragged or carried his wife in broad-day-light, it was held that in the absence of any proof that the intention of the accused was to compel the wife to illicit intercourse they could not be convicted under this section but only under s. 325[7]. In an English case the Court of Criminal Appeal held, overruling the view of Channell, J., that the word 'seduction' in its ordinary sense means the inducing of a girl to part with her virtue for the first time[8]. Channell, J., was of opinion that the word was not confined to the first connection of an unmarried woman but that it covered a case of fornication or continual connection between unmarried persons[9]. In a Burma case Adamson, J., said: "I am unable to hold that the words in s. 366, 'seduce to illicit intercourse', refer only to the first act of seduction or the surrender of chastity. To 'seduce', as defined in Webster's Dictionary, is to draw aside from the path of rectitude and duty in any manner, to entice to evil, to lead astray, to tempt, and lead to iniquity. I think that it would be a monstrous proposition, and one that would strike at the very roots of social and moral rectitude to hold that, because a man had induced a girl, while in the custody of her parents, to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live with him in a condition of concubinage not sanctioned by marriage"[10]. The object of the section is to punish not the seduction by itself but the kidnapping of the kidnapped[11]. The words 'illicit intercourse' mean merely sexual intercourse

1 *Ahmed Bepari*, (1924) 26 Cr. L. J. 290.

2 *Sher*, (1923) 25 Cr. L. J. 430. *Sant Ram*, (1929) 30 P. L. R. 573.

4 *Mussammat Mehran*, (1916) P. R. No. 13 of 1916.

5 *Jaladu*, (1911) 36 Mad. 453.

6 *Taher Khan*, (1917) 45 Cal. 641; *Sant Ram*, sup.

7 *Hazara Singh*, (1926) 27 P. L. R. 867.

8 *Moon*, (1910] 1 K. B. 818, 824.

9 *Ibid*, p. 820. The view of Channell, J., was followed by Kincaid, J. C., in *Pessumal*, (1924) 27 Cr. L. J. 1292, Kennedy, J. C., did not agree. In this case a man had induced a girl, while in the custody of her parents, to surrender her chastity to him and thereafter induced her to leave the protection of her parents and live with him in a condition of concubinage. It was held that he was guilty of an offence under this section. In a subsequent case, the same Judge said that "on each occasion that a woman *is* persuaded to indulge in illicit intercourse she is being tempted into sin and so seduced in this wider sense": *Saran*, (1926) 28 Cr. L. J. 66, 68.

10 *Nga Ni Ta*, (1903) 10 Burma, L. R. 196, 197. This case is therefore in conflict with *Nga Chan Mya*, (1902) 1 L. B. R. 297; *Nga Nge*, (1905) U. B. R. (P. C.) 17; *Durga Das*, (1904) P. R. No. 13 of 1904; *Srimotee Poddee*, (1864) 1 W. R. (Cr.) 45.

11 *Krishna Maharana*, [1929] Cr. C. (Pat.) 379, *Nga Ni Ta*, sup., referred to.

between a man and a woman who are not husband and wife[1]. Where a man kidnaps a minor girl from lawful guardianship and thereafter cohabits with her without marriage he has, subsequent to the kidnapping, seduced her to illicit intercourse, and he has kidnapped her in order that she may be seduced to illicit intercourse and he has committed an offence under this section quite independent of any intention or consent on the part of the minor girl and quite independent of any question as to whether she had surrendered her chastity before the act of kidnapping[2]. Where a woman, who was going peaceably with her husband on the road was robbed of all her ornaments and jewellery, and carried off by force to a distant village where she was kept confined in a house to which no other person could have any access except the accused themselves it was held that no other inference was possible except that the woman was carried off with the object that she might be forced or seduced to illicit intercourse[3].

If the intention to kidnap a girl in order to seduce her to illicit intercourse is present, the fact that the accused had illicit intercourse with the girl before she was kidnapped is wholly immaterial[4].

The mere taking of a girl to an immigration recruiter is not necessarily the taking of the girl to his house with a knowledge that it was likely that she would be forced or seduced to illicit intercourse[5].

Under Buddhist law a man cannot contract a valid marriage with a minor without her guardian's consent. Therefore sexual intercourse without such consent will be illicit intercourse under this section even though marriage is intended[6].

Seduction *per se* is not a criminal offence either in India or in England.

Marrying a girl for the purpose of inducing her to prostitute herself.— Where the accused by false representations and deceitful means induced a girl to marry him and leave her home and accompany him to Kohat, where, upon their arrival, he instigated her to prostitute herself, and it appeared that it was with that end in view that he had induced the girl to marry him, it was held that he was guilty of an offence under this section[7].

[illegible]

the ag[illegible]

days i[illegible]

was held that the woman in whose house the girls stayed was guilty of an offence under this section[8].

Abduction of a married woman with intent to compel her to marry another.—One W on her husband's death returned as a widow to live with her mother. She received a proposal of marriage from D but she refused him as he was an old man with children. *She entered into a marriage in nika form with P. The accused a* day after the marriage came to her house and took her away by force to a place and there she received another proposal of marriage from D. It was held that the accused were guilty of an offence under this section[9].

Abetment.—A married woman consenting to her own kidnapping cannot be convicted of abetting the offence. If the woman is herself a consenting party [illegible] she abetted [illegible] have been [illegible] consequently, [illegible] fact is [illegible] committed.

1 *Mahbul* (1907) 27 A W N 190.
2 *Nga Ni Ta*, (1910) 10 Burma L.R. 190.
[illegible]
[illegible] 74
[illegible]

6 *Nga Ne U*, (1893) S. J. L. B. [illegible]
7 *Pakedar* (188[illegible]) P. L. R. [illegible]
8 *Jamali*, (1912) 34 All. [illegible]
9 *Taler Khan*, (1917) [illegible]
10 *Natha Singh* (188[illegible]) P[illegible] 11

Clause 2.—This clause was added by Act XX of 1923. As to the meaning of 'criminal intimidation', see s 503.

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused[1]; or abduction by him[2].

(2) That the person so kidnapped or abducted is a woman.

(3) That the accused then intended, or knew that it was likely,

(a) that such woman might or would be compelled to marry a person against her will, or

(b) that she might or would be forced or seduced to illicit intercourse .

Intention is a matter of inference from the circumstances of the case and the subsequent conduct of the accused after the abduction has taken place[4].

Under the second part of the section prove—

(1) That the accused induced a woman to go from any place by criminal intimidation, or abuse of authority, or by compulsion.

(2) The accused did so with intent, or knowledge that it was likely, that the woman might or would be forced or seduced to illicit intercourse with some person.

The most important witness in an abduction case is generally the abducted woman herself and where she is not forthcoming and the other witnesses are not of a very reliable type, the prosecution evidence must be carefully scrutinised and weighed[5].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Direction to jury.—In a trial with a jury under this section the Sessions Judge on the question of intent charged the jury in the following words: "It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent in the face of the facts''. It was held by the High Court that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put to the jury left them no option but to adopt the view taken by the Judge[6].

Punishment.—Under s. 363, imprisonment, which may extend to seven years, is the punishment for kidnapping. The extra three years prescribed by s. 366 are most appropriate for the intention to bring force or persuasion to bear on the girl, after she has been removed from the shelter of her home and deprived of the support which her guardian's presence would give her in resisting either threats or enticements. It is contrary to the well-known rule of construction of penal statutes to say that an intention to seduce to illicit intercourse can be presumed, when the girl has already consented to illicit intercourse[7].

Where the accused had forcibly carried away the complainant and had subsequently raped her, it was held that he had brought himself within the purview of this section the moment he forcibly carried her away with the intention of having illicit intercourse with her, and the infliction of a separate additional sentence under s. 376 for rape was not contrary to the provisions of s. 71 of the Code[8].

1 *Vide* s. 363, sup.; *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42.
2 *Vide* (1) and (2), s. 364, sup.
3 *Meer Alum Khan*, (1868) P. R. No. 23 of 1868; *Naba*, (1911) P. L. R. No. 193 of 1911.
4 *Banta Singh*, (1928) 29 Cr. L. J. 643.
5 *Ghulam*, (1926) 28 Cr. L. J. 277.
6 *Hughes*, (1891) 14 All. 25.
7 *Nga Nge*, (1905) 11 Burma L. R. 326. U. B. R. (P. C.) 17.
8 *Ghulam Muhammad*, (1926) 7 Lah. 484.

Alteration of charge —It is not competent to a Judge in appeal to alter a charge under s 376 of the Code to one under this section because a charge under this section involves different elements and different questions of fact from a charge under s 376[1].

abduction[2]

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, kidnapped (*or* abducted) a woman, to wit——, with intent that she may be compelled (*or* knowing it to be likely that she will be compelled) to marry against her will [*or* in order that the said woman——may be forced (*or* seduced) to illicit intercourse, or knowing it to be likely that she will be forced (*or* seduced) to illicit intercourse] and thereby ... Penal Code and within

... ourt on the said charge

If the offence is committed under the second clause the charge should say —

That you, on or about the——day of——, at——, induced a woman, to wit—— to go from (*mention place*) with intent that she may be (*or* knowing that it is likely that she will be) forced (*or* seduced) to illicit intercourse with another person by means of criminal intimidation (*or* abuse of authority *or* other method of compulsion to wit——) and thereby committed an offence punishable under the second part of s 366 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court)

Procuration of minor girl

366A. Whoever, by any means whatsoever[1], induces[2] any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse[3] with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine

COMMENT.

This section and s 366B were added by Act XX of 1923 to give effect to ... the Suppression of the Traffic in ... f the Convention which was signed

"Article 1 —Whoever, in order to gratify the passions of another person, ... girl under ... arious acts

"Article 2 —Whoever, in order to gratify the passions of another person has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished notwithstanding that the various acts constituting the offence may have been committed in different countries

"Article 3 —The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding ...

1 *Sakharam Cass*, (1905) 8 Bom L. R. 150   2 *Ira Sheikh*,

engage to take or to propose to their respective Legislatures the necessary steps to punish these offences according to their gravity"[1].

The Statement of Objects and Reasons stated: "The principles in this International Convention were endorsed in the International Convention regarding the Traffic in Women and Children which was adopted by the Second Assembly of the League of Nations. In Article 1 of this Convention it is provided that the High Contracting Parties in event of their not being already parties to the International Convention of May 4, 1910, shall transmit with the least possible delay their ratifications of, or adhesions to, that instrument in the manner laid down therein. Further, the term "underage" which did mean under 20 completed years of age, according to paragraph B of the final Protocol of the Convention of 1910 is now interpreted as meaning under 21 completed years of age by virtue of the provisions of Article 5 of the International Convention, adopted by the Second Assembly of the League of Nations.

"In view of the resolutions adopted by the Council of State on January 31, 1922, and by the Legislative Assembly on February 7, 1922, the International Convention adopted by the Second Assembly of the League of Nations was signed at Geneva on behalf of the Government of India by His Majesty's Minister at Berne on March 28, 1922, with the following reservation:—

'India reserves the right of its discretion to substitute the age of sixteen years or any greater age that may be subsequently decided upon for the age limit prescribed in paragraph B of the Final Protocol of the Convention of May 4, 1910, and in Article 5 of the present convention'"[2].

Object.—This section and s. 366B were introduced to punish the export and import of girls for prostitution. This section deals with procuration of minor girls from one part of British India to another. Section 366 penalises the procuration of a woman where such procuration amounts to abduction. The aim of this section is to prevent immorality, and its provisions are framed more with the desire of safeguarding the public interest of morality than the chastity of one particular woman. Often it may happen that a girl under eighteen may desire to leave her husband to better her prospects elsewhere. Such a desire would not save her helper from a conviction under this section[3].

1. 'By any means whatsoever'.—The means employed may be legal or illegal. The means may be intimidation or abuse of authority referred to in the second article of the International Convention.

An offence under this section is one of inducement with a particular object and when after inducement the offender offers the girl to several persons, a fresh offence is not committed at every fresh offer for sale and the several offers for sale evidence the criminal intention of the offender just as much as one offer for sale[4].

2. 'Induces any minor girl'.—Any reason given by the accused to move the girl from one place to another is sufficient for inducement. Even where the girl discovers that she is not being so taken and falls in with the plan of the accused, the inducement is complete, and the girl's subsequent willingness will neither prevent the offence nor reduce its gravity[5].

3. 'Forced or seduced to illicit intercourse'—See Comment on s. 366. Merely giving shelter to a girl or taking her from one place to another without knowing that she is a married girl and without any intention or knowledge that she is likely to be forced or seduced to illicit intercourse with another person is no offence under this section[6]. Accused took a girl of less than eighteen years of

1 Vide *Gazette of India*, (1922) Part V, p. 343.
2 *Ibid.*
3 *Bhagwati Prasad*, (1929) 119 I. C. 14.
4 *Sis Ram*, [1929] A. L. J. 800.
5 *Bhagwati Prasad*, sup.
6 *Rati Ram*, (1927) 28 P. L. R. 260.

age from place to place with the intention of compelling her to marry against her will or in order that she may be forced or seduced to illicit intercourse. There was no evidence that the girl was compelled to accompany the accused by force or by deceitful means. It was held that the accused was guilty of an offence under this section and not s. 366[1].

PRACTICE.

Evidence.—Prove (1) that the accused induced a girl.

(2) That the girl was under eighteen years of age.

(3) That the girl was induced to go from a place or to do an act.

(4) That the accused did as above with intent that such girl may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.

Procedure.—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you on or about the——day of —— at——, induced AB——a girl under eighteen years of age [to go from——(*specify the name of the place*)] *or* [to do the following act, to wit——] with intent that the said AB may be (*or* knowing that it is likely that the said AB will be) forced (*or* seduced) to illicit intercourse with ——(*name the person*) and thereby committed an offence punishable under s. 366A of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Importation of girl from foreign country.

366B. Whoever imports into British India from any country outside India, any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse[1] with another person,

and whoever with such intent or knowledge imports into British India from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person,

shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

COMMENT.

This section was introduced along with s. 366A by Act XX of 1923. See Comment on s. 366A.

Object.—This section makes it an offence (1) to import into British India from any country outside India a girl under the age of twenty-one years with the intent or knowledge specified in the section, or (2) to import into British India from any State in India a girl under the age of twenty-one years who has been imported in such state from any country outside India with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with any person. The Select Committee in their Report observed: 'The case of girls imported from foreign country we propose to deal with by the insertion of a new

1 *Saadat Khan* (1925) 26 Cr. L. J. 1151

section 366B in the Code. We are unanimously of opinion that the requirements of the Convention will be substantially met by penalising the importation of girls from a foreign country. At the same time we have so worded the clause as to prevent its being made a dead-letter by the adoption of the course of importing the girl first into an Indian State"[1].

1. **'Forced or seduced to illicit intercourse'.**—See Comment on s. 366.

PRACTICE.

Evidence.—Prove (1) that the accused imported a girl into British India;

(2) That the girl was imported from any country outside India or from any State in India.

(3) That such girl was under the age of twenty-one years.

(4) That the accused imported the girl with intent that she may be, or knowing it to be likely that she will be, forced or seduced to 'illicit intercourse' with some person.

Procedure.—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, imported into British India from——(*specify the name of the country*) a country outside India (*or* a State in India) by yourself [*or* by——(*mention the name of the person*)] AB, a girl under the age of twenty one years with intent that she may be (*or* knowing it to be likely that she will be) forced or seduced to illicit intercourse with another person to wit, ——and thereby committed an offence punishable under s. 366B of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

367. Whoever kidnaps or abducts any person[1] in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt[2], or slavery[3], or to the unnatural lust[4] of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Kidnapping for grievous hurt, slavery, or unnatural offence, is punishable under this section.

1. **'Person'.**—See s. 11, *supra*.
2. **'Grievous hurt'.**—See s. 320, *supra*.
3. **'Slavery'.**—See ss. 370, 371, *infra*.
4. **'Unnatural lust'.**—See s. 377, *infra*.

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused[2]; or abduction by him

[1] *Gazette of India*, dated February 10, 1923, Part V, p. 79.

[2] *Vide* s. 363, sup.

[3] *Vide* (1) and (2), s. 364, sup.

(2) That he so kidnapped or abducted the person in question—

(a) in order that such person might be subjected to grievous hurt, slavery, etc, or to unnatural lust, etc

(b) in order that such person might be so disposed of as to be put in danger thereof,

(c) knowing it to be likely that such person would be so subjected or disposed of

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge – I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the—— day of——, at——, kidnapped (*or* abducted XY in order that the said XY may be subjected (*or* may be so disposed of as to be put in danger of being subjected) to grievous hurt [(*or* slavery *or* to the unnatural lust of——) *or* knowing it to be likely that such person will be so subjected or disposed of], and thereby committed an offence punishable under s 367 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge

368 Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals[1] or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Wrongfully concealing or keeping in confinement kidnapped or abducted person

COMMENT

This is one of those sections in which subsequent abetment is punished as a substantive offence

Scope.—This section refers to some other party who assists in concealing any person who has been kidnapped and not to the kidnappers[1] A kidnapper who has been convicted under s 366 cannot, therefore, be convicted also under s 368[2] For the purpose of this section, it is not necessary to prove that the person confined was abducted by any particular person

1. **'Wrongfully conceals'.**—These words, taken in their plain and ordinary [illegible]

[illegible] appears that the act of concealment refers to the withdrawal from the actual observation of others, by removal or otherwise, of the person kidnapped or abducted, and does not include the mere giving of false information about such person[3] The mere fact of a girl being received into a house and retained there by the owner, even after he may have become aware of or found reason to believe that she had been kidnapped, does not amount to concealment of her unless an intention of keeping her out of view be apparent[4]

1 *Sheikh Oozeer*, (1866) 6 W R (Cr) 17
2 *Basau Mal* (1926) 2 Luck 249
3 *Phula Singh* (1874) P R No 10 of 1874
4 *Jhurrup* (1873) 5 N W P [illegible] *Nur[illegible] mat Chulboon*, (1873) 5 N W [illegible]

CASES.

Concealing a kidnapped girl.—Where a girl of eleven years of age was taken out of the custody of her lawful guardian by the first accused and offered for sale in marriage to another, and the second accused illegally concealed her, the conviction of the former was upheld under s. 363, and of the latter, under s. 368[1]. A girl under sixteen years of age who lived with her widowed mother was going to a vegetable market in search of work. On her way she met another woman who asked the girl to accompany her under a promise of obtaining work for her. The woman took the girl to her house and kept her there till evening, when she was removed by the accused in a closed carriage to a solitary bungalow far away from the town. The girl was kept there during two days and nights, after which she was permitted to return to her house. It was held that the accused had committed this offence[2].

PRACTICE.

Evidence.—Prove (1) that the person in question has been kidnapped or abducted.

(2) That the accused knew of such kidnapping or abduction.

(3) That he, having such knowledge, wrongfully kept or concealed such person in confinement.

Prove also the intention or knowledge with which the accused concealed or kept such person in confinement; or prove the purpose for which he did so.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Even if a charge under this section is unsustainable, ss. 420, 494 and 109 of the Code may apply[3]. But a conviction under ss. 368 and 109 is a bar to a conviction for wrongful confinement under s. 343 of the Code[4].

Joint trial.—A and B abducted a girl and took her to the house of C where she was wrongfully confined. A, B, and C were jointly tried, A and B for offences under s. 366 and C for an offence under this section. It was held that the joint trial was valid[5].

Kidnapping or abducting child under ten years with intent to steal from its person.

369. Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly[1] any moveable property[2] from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Object.—Enticing away of children with no intention of taking them from parents, but for the purpose of stealing ornaments from their person is punishable under this section.

Scope.—The offence described in s. 363 is included in that described in this section, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter section[6]. The consent of the child kidnapped is immaterial.

1 ...e Panday, (1867) 7 W. R. (Cr.) 56.
2 ...a Nathoo, (1904) 6 Bom. L. R. 785.
3 ...him, (1893) P. R. No. 7 of 1894.
4 ...ar Chandra Jogee, (1864) W. R. (Cr.) (Gap. No.) 21.
5 Dosa, (1928) 29 Cr. L. J. 496.
6 Shama Sheikh, (1867) 8 W. R. (Cr.) 35.

1. **'Dishonestly'.**—See s 24, *supra*
2. **'Moveable property'.**—See s 22, *supra*

PRACTICE

Evidence —Prove (1) the kidnapping by the accused[1], or abduction by him[2].

(2) That the person kidnapped or abducted was a child under the age of ten years

(3) That the accused thereby intended to take moveable property from that child s person

(4) That such intention was dishonest

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

Commitment —This being a serious offence a Magistrate should always commit the case[3]

Charge —I (*name and office of Magistrate etc* ,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, kidnapped (*or* abducted) XY, a child then under the age of ten years, with the intention of taking dishonestly any moveable property, to wit——, from the person of the said XY, and thereby committed an offence punishable under s 369 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* High Court,

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

370 Whoever imports, exports, removes, buys, sells or disposes of any person as a slave[1], or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Buying or disposing of any person as a slave

COMMENT

This section deals with slavery Before the Penal Code was enacted, slavery was dealt with by Act V of 1843

Object —The sections of the Code relating to slavery were enacted for the ndition, master power is asserted over the liberty of another[4]

This section is directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect [5]

Ingredients —The section makes penal—

1 The importation exportation, removal, buying, selling or disposing of a person as a slave

2 The buying, selling or disposal of a person as a slave

3 The acceptation reception or detention of any person against his will as a slave

[1] Vide s 363 sup.
[2] Vide (1) and (2), s 361 sup.
[3] Sahdeo Dome (1866) 6 W R (Cr) 2.
[4] Per Oldfield, J, in Ram Kuar, (1880) 2 All 723, 731, F B See Konth Jammad (1917) 41 Mad. 731
[5] Per Stuart, C J, in Ram Kuar ibid, p 727

1. 'As a slave'.—"A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life or death, over the slave, without being responsible to any legal authority"[1].

There must be a selling or disposal of a person as a slave, that is, a selling or disposal whereby one who claims to have a *property* in the person as a slave transfers that property to another[2].

There may be lawful contracts for the transfer of a child by its parents either for a time or permanently to another person; as in the case of a child whose parents permit it to be adopted by others, or in the case of a child who is apprenticed or put out for a time to learn a lawful trade or calling, etc. These, it is needless to say, are not offences against this or any other section of the Code. But care should be taken that the law is not eluded by some device or pretence of a contract. When the *substance of the transaction is an attempt to give a property in the person* and services of a human being, that person is disposed of 'as a slave' within the meaning of this section, whatever form the parties to the transaction may attempt to give it[3]. *In determining the nature of the transaction the Court should loo*' primarily to the terms of the documents in which it is embodied, and, secondarily, to the surrounding circumstances as indicating whether the parties had in mind something different from what is set forth in the document[4].

Importing into British India a girl purchased in a foreign territory.—"*The purchase of a girl in foreign territory, knowing her to be a slave, is not in itself* an offence punishable under the Indian Penal Code, and to make the importing of her into British territory offence, it is necessary that...he (the accused) imported her *as a slave*"[5].

Buying girls for marriage.—Buying or importing girls with a view to *marriage is not punishable under this section*[6]. Where R, having obtained possession of D, a girl eleven years of age, disposed of her to a third person for value, with intent that such person should marry her and such person received her with that intent, it was held that R could not be convicted of disposing of D as a slave under this section[7].

CASES.

Selling a girl.—A kidnapped a Hindu girl and sold her to B, a Mahomedan. B made her a Mahomedan, changed her name, supplied her with food and clothes, but gave her no wages. She was employed in menial services, and was not allowed to leave the house. After staying thus for four years the girl escaped. It was held that B had committed an offence under this section[8].

Buying a girl.—S transferred to A for Rs. 25 his right in the person of B, a girl of thirteen years. In a document in which the transaction was recorded, B was described as a *vellati* (slave girl) purchased by S from P. It was held that A was guilty of buying B as a slave[9]. The accused were parties to a document in the capacity of vendor and purchaser which ran as follows:—"I execute to you and give you this day this jenmam deed giving you Vellandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please".

1 *Ram Kuar*, (1880) 2 All. 723, p. 726.
2 *Ibid*, p. 731.
3 M & M. 320.
4 *Koroth Mammad*, (1917) 41 Mad. 334.
5 Per Barkley, J., in *Nanda*, (1882) P. R. No. 26 of 1882.
6 *Roda*, (1867) P. R. No. 19 of 1867; *Nanda*, sup.; *Ganpat*, (1884) P. R. No. 29 of 1884.
7 *Ram Kuar*, sup.
8 *Mirza Sikundur Bukhut*, (1871) 3 N. W. P. 146. This has been pronounced to be a most extraordinary decision by Stuart, C. J., in *Ram Kuar*, sup.
9 *Amina*, (1884) 7 Mad. 277.

It was held that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the accused were guilty of an offence under this section[1].

PRACTICE.

Evidence.—Prove (1) that the accused imported, exported, etc , the person in question as a slave , or

that the accused accepted, received or detained the person in question as a slave

(2) That he did so against the will of that person

Procedure — Not cognizable— Warrant —Bailable— Not compoundable— Triable by Court of Session

Jurisdiction not affected by re-sale —Jurisdiction to try such an offence is not affected by a re sale of the person as a slave in another district[3]

Charge —I (*name and office of Magistrate, etc ,*) hereby charge you (*name of accused*) as follows —

That you, on or about the — day of , at——, imported (*or* exported *or* removed *or* etc) a person to wit —, as a slave [*or* accepted, received *or* de

a slave] and thereby committed an

Penal Code and within the cognizance

the said Court on the said charge

371. Whoever habitually imports, exports, removes, buys, sells, trafiics or deals in slaves shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Habitual dealing in slaves

COMMENT.

This section is enacted for the punishment of the slave-trader, who is habitually engaged in the traffic of buying and selling human beings The last section dealt with a casual offender A slave dealer on land is punished under this section, such a dealer on sea is treated as a pirate by all civilised nations and punished severely

PRACTICE.

Evidence.—Prove (1) that the accused imported, exported, etc , slaves

(2) That he did so habitually

Procedure —Cognizable—Warrant—Not bailable—Not compoundable — Triable by Court of Session

372. Whoever sells, lets to hire, or otherwise disposes of[1] any person under the age of eighteen years[2] with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any

Selling minor for purposes of prostitution, etc

[1] *Kandh Mammad* (1917) 41 Mad 334

[2] [illegible] Cir 25 of 1863 (Oudh)(?)

[3] *Nga Shwe Pe* (1890) P J L B 81

unlawful and immoral purpose[3], or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section 'illicit intercourse' means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi*-marital relation.

COMMENT.

This section has been materially altered.

The age-limit was raised to eighteen years from sixteen by Act V of 1924, s. 2. The words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illict intercourse with any person for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1924, s. 2. Explanations I and II were added by s. 3 of the same Act. "The amendment is designed to make it clear that an offence is committed under section 372 or 373 of the Indian Penal Code, when the minor is either disposed of or procured for the purpose of being sexually known either before or after attainment of the age of eighteen years, and whether she is made over to a life of immorality or merely subjected to an isolated act of carnal intercourse. In either case the child is equally deserving of protection"[1].

The gist of the offence under this section or s. 373 consists in the intention that the person under the age of eighteen years shall be employed or used for the purpose of prostitution, or for illicit intercourse, or for any unlawful and immoral purpose, or in the knowledge that it is likely that such person will be employed or used for any such purpose. In the absence of any intention or knowledge of the kind referred to the mere buying, selling, letting, or obtaining possession of such person is not *per se* a criminal act[2]. But where such intention or knowledge does exist, and a change in the position or circumstances of the person has been effected with such knowledge or intention, it is quite immaterial whether third persons have or have not observed any ceremonies recognized by custom as necessary to give prostitutes a particular status[3]. The offence consists in the intentional or con-

[1] Statement of Objects and Reasons appended to Bill No. 9 of 1924, *Gazette of India*, 1924, Part V, p. 36.

[2] See *Khushala*, (1880) P. R. No. 27 of 1880.

[3] *Bhimde Pandu Deoli*, (1905) 7 Bom. L. R. 562.

scious exposure of a person under eighteen years whether a male or a female, to the danger of degradation

This section deals with the person who sells such person, the next section punishes the person who buys such person

Scope —This section applies to married as well as unmarried females under the age of eighteen years[1], and is applicable even where the girl concerned is a member of the dancing girl caste[2] The offence under this and the following section is committed even though the girl prior to sale or purchase, was leading an immoral life[3]

Ingredients.—The section requires the following essentials —

1 Selling or letting to hire or other disposal of a person

2 Such person should be under the age of eighteen years

3 The selling, letting to hire or other disposal must be with intent, or knowledge of likelihood that the person shall at any age be employed or used for

(i) the purpose of prostitution, or

(ii) illicit intercourse with any person, or

(iii) any unlawful and immoral purpose

1 'Sells, lets to hire, or otherwise disposes of' —The terms 'sell and 'hire' do not necessarily conn t a present or immediate transfer of possession and where a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession[4] The words lets to hire' are the counterpart of the word hire' in s 373 The section now contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse, or with the intention of subjecting her to an isolated act of sexual intercourse[5] Where a young prostitute [illegible] of the com [illegible] ontemplated [illegible] the purpose [illegible] ose of being [illegible]

Where a girl was deserted by her husband and after living with prostitutes and others for a time finally took up her residence in the brothel kept by the accused, well knowing their occupation and there prostituted herself to all comers the accused housing feeding and clothing her in consideration of receiving the wages of her prostitution it was held that the accused by thus receiving money did not let the girl to hire within the meaning of this section, and that the persons, whom the girl, in consideration of a money payment to the accused, allowed to have intercourse with her, did not hire her within the meaning of s 373[7]

A Full Bench of the Madras High Court held that the term 'dispose of' has many meanings It denotes (*inter alia*) ' to bestow for an object or purpose', to make a change in the circumstances , it does not necessarily imply that there has been a transfer of possession nor indeed do the terms 'sell or 'hire' necessarily connote a present or immediate transfer of possession and where, as is no doubt generally the case, a transfer of possession is contemplated, the offence is complete

[1] *Kammu* (1878) P R No 12 of 1879

[2] See *Ramanna* (1889) 12 Mad 273

[3] See *Ismail Fuskmkhan* (1906) 8 Bom L R 236

[4] (1881) 1 Weir 359 362 f n.

[5] *Ahmedkhan*, (1898) Unrep Cr C 962 *Dowlath Bee v Shaikh Ali* (1870) 5 M H C 473 • *Musammat Kalman*, (1872) P R No 29 of 1872 *Mohubbut*, (1873) P R No 16 of 1873 *Nga Shwe Thwe* (1907) 1 U B R (1907-09) (P C) 1 are of no authority

[6] *Sukee Pawr*, (1893) 21 Cal 97, *Noorjan* (1870) 14 W R (Cr) 39 6 Beng L R App 34 See *Maddula Mutyalu* (1918) 35 M L J 157

[7] *Ahmedkhan*, sup.

scious exposure of a person under eighteen years, whether a male or a female, to the danger of degradation

This section deals with the person who sells such person, the next section punishes the person who buys such person

Scope.— This section applies to married as well as unmarried females under the age of eighteen years[1], and is applicable even where the girl concerned is a member of the dancing girl caste[2]. The offence under this and the following section is committed even though the girl prior to sale or purchase, was leading an immoral life[3].

Ingredients.—The section requires the following essentials —

1 Selling or letting to hire or other disposal of a person

2 Such person should be under the age of eighteen years

3 The selling letting to hire or other disposal must be with intent, or knowledge of likelihood that the person shall at any age be employed or used for

(i) the purpose of prostitution, or

(ii) illicit intercourse with any person, or

(iii) any unlawful and immoral purpose

1. 'Sells, lets to hire, or otherwise disposes of' —The terms 'sell' and 'hire' do not necessarily connote a present or immediate transfer of possession and where a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession[4]. The words 'lets to hire' are the counterpart of the word 'hire' in s 373. The section now contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse, or with the intention of subjecting her to an isolated act of sexual intercourse[5]. Where a young prostitute [illegible] of the com [illegible] contemplated [illegible] the purpose [illegible] ose of being [illegible] ig out by the [illegible]

Where a girl was deserted by her husband and after living with prostitutes and others for a time, finally took up her residence in the brothel kept by the accused, well knowing their occupation and there prostituted herself to all comers, the accused housing, feeding and clothing her in consideration of receiving the [illegible] ng money [illegible] persons, [illegible] llowed to have intercourse with her, did not hire her within the meaning of s 373[7].

A Full Bench of the Madras High Court held that the term 'dispose of' has many meanings It denotes (*inter alia*) "to bestow for an object or purpose", "to make a change in the circumstances", it does not necessarily imply that there has been a transfer of possession, nor indeed do the terms 'sell' or 'hire' necessarily connote a present or immediate transfer of possession, and where, as is no doubt generally the case, a transfer of possession is contemplated, the offence is complete

1 *Kamma* (1878) P. R. No. 12 of 1879

2 See *Lamanna* (1889) 12 Mad 273

3 See *Ismail Lalkhan*, (190[illegible]) 8 Bom. L. R. 236.

4 (1881) 1 Weir 359 362, F.B.

5 *Ahmedkhan*, (1878) Unrep. Cr. C. 962. *Dowlath Bee* v. *Shaik Ali*, (1870) 5 M. H. C. 473; *Massamat Kaliman*, (1872) P. R. No. 29 of 1872. *Mohtabal*, (1873) P. R. No. 16 of 1873. *Nga Shwe Than* (1907) 1 U. B. R. (1907-09) (P. C.) 1 are of no authority

6 *Sukee Pasee*, (1893) 21 Cal 97. *Nooyan* (1870) 14 W. R. (Cr.) 39 6 Beng. L. R. App. 34. See *Mahboo Malyala*, (1919) 37 M. L. J. 157

7 *Ahmedkhan*, sup.

on proof of the sale or hiring and without any proof of a transfer of possession"[1]. It is not necessary that there should have been a disposal tantamount to a transfer of possession or control over the minor's person[2]. In a later case, the same High Court said: "The term 'dispose of' has many meanings. In Webster's Dictionary it is defined as (a) to determine the fate of, to exercise the power of control over, to fix the condition, employment, etc., of, to direct or assign for a use; (b) to exercise finally one's power of control over, to pass over into the control of someone else as by selling, to get rid of. Seeing that the term in s. 372, Indian Penal Code, is used in conjunction with selling and letting to hire, it would seem that the Legislature rather contemplated some physical disposal for a mercenary purpose or the exercise of some power of control which would be final and irrevocable in its *moral effects*, more especially as the words used are 'sells, lets to hire, or *otherwise* disposes of', thus suggesting other acts *ejusdem generis*"[3]. Where the accused, who was a customer of a brothel, came across a minor girl, who had run away from her father's house, unable to bear the ill-treatment of her step-mother, and directed her to the brothel, it was held that such a mere direction to her or recommending to her to go there would not constitute a 'disposal', within the meaning of this section[4]. The word 'disposal' necessarily connotes some control by the person disposing over the minor disposed of[5].

The Bombay High Court has held that the performance of *gejjee* ceremony on a minor girl does not amount to her disposal within the meaning of this section[6]. Similarly, it has held that the ceremony of tying a Talimani to a minor girl, worshipping a basin of water by her and distributing food, is merely a preliminary step before the selling, letting out, or disposing of the girl for the purpose of prostitution, and is no offence under this section[7].

2. **'Person under the age of eighteen years'.**—The age-limit was raised to eighteen years by Act V of 1924, s. 2. The section applies to all persons under eighteen years, whether males or females.

3. **'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose'.**—It is necessary to prove that the accused intended that the person *shall* be employed for an immoral purpose. Mere possibility of the person being so used is not sufficient. It would be sufficient to show that the girl was given and accepted with the intention mentioned in the section. When an act is not *per se* criminal the specific intent which renders it criminal must be established by cogent evidence.

'At any age'.—The introduction of these words takes away the defence that though a girl was made over to a prostitute it was not intended that she should actually be used for the purpose of prostitution until she had passed the age of eighteen years[8].

'For the purpose of prostitution'.—Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that must be taken to be its meaning in the section[9]. The word 'prostitution' is not confined to acts of natural sexual intercourse, but includes any

1 (1881) 1 Weir 359, 362, F.B.; *Marakathan*, (1881) 1 Weir 364. See *Noorjan*, (1870) 14 W. R. (Cr.) 39.
2 *Arunachellam*, (1876) 1 Mad. 164.
3 Per Parker, J., in *Srinivasa* v. *Annasami*, (1892) 15 Mad. 323, 329.
4 *Nari*, (1924) 48 M. L. J. 59, 21 L. W. 472.
5 *Ibid.*
6 *Parmeshwari Subbi*, (1920) 22 Bom. L. R. 894, 5 Bom. Cr. C. 237.
7 *Sahebava Birrappa*, (1925) 27 Bom. L.R. 1022, 8 Bom. Cr. C. 66.
8 *Ramanna*, (1889) 12 Mad. 273; *Karuna Baistobi*, (1894) 22 Cal. 164, overruled.
9 Per Scotland, C. J., in *Dowlath Bee* v. *Shaik Ali*, (1870) 5 M. H. C. 473, 476.

act of lewdness. Prostitution is proved if it is shown that a woman offers her body for purposes amounting to common lewdness in return for the payment of money[1].

'Illicit intercourse with any person'.—These words were added by Act XVIII of 1921, s 2. If the person disposing of a girl knew that she would be used for illicit intercourse he would be liable. Explanation II explains what is meant by illicit intercourse. These words take away the defence that though the girl was handed over to a particular man for his carnal knowledge of her, yet it was not intended that she should be a prostitute at all, and that though the act or acts for which she was given may have been immoral, yet they were not unlawful[2]. The accused will not be able to rely on the plea that the girl was not destined for a life of prostitution but merely for a single act of sexual intercourse.

Unlawful and immoral purpose.—The purpose must be both unlawful and immoral. The accused transferred his daughter to a person for the purposes of concubinage. It was held that the accused was guilty under this section[3].

Adoption of a daughter by a dancing girl.—Where a dancing girl adopted a daughter, it was held that she had committed no offence if the girl was [illegible] e of following [illegible] ulty under the [illegible] minor[4]. Subsequently the same High Court has held that such an adoption would be an offence under the Penal Code[5]. The Bombay High Court has held such an adoption to be invalid[6]. Under the present section such an act would be an offence if it was done with the intention or knowledge specified in the section. The burden of proof that the possession of the girl is not given to or obtained by a prostitute for leading an immoral life is on the person who gives the possession of such girl and the person who receives the girl under explanation 1 to this section and s 373.

Explanation 1.—This explanation provides that if a minor girl is disposed of to a prostitute or to a brothel keeper or manager, the person so disposing of her shall be presumed to have done so with the improper intent mentioned in the s 372[7]. The same presumption is raised in the case of a prostitute or a brothel keeper who obtains possession of a girl under explanation 1 to s 373.

Explanation 2.—This explanation defines the expression 'illicit intercourse'.

Dev Dasi.—The dedication of girls under eighteen years to the service of a temple as dasis will amount to a disposal of such minors knowing it to be likely that they will be used for the purpose of prostitution within the meaning of this section[8]. The Member introducing the Bill amending this section said "We have not definitely assumed that employment as dev dasis is equivalent to employment for purposes of prostitution but should such employment actually

1 De Munck [1918] 1 K. B. 635; Lalya Bapu Jo'har (1929) 31 Bom L R 421, 10 Bom Cr C 94.
2 Mula (1888) I L No 13 of 1888 over ruled.
3 [illegible] (1883) 1 Weir 273.
4 Ramanna (1889) 12 Mad 273; Poonam gam au[illegible]

pended [illegible] 9 of 1924, Gazette of India, Part V p 3[illegible]
5 See (1881) [illegible]

prove to come within that definition our Bill will enable it to be dealt with more effectively than hitherto"[1].

In a Madras Full Bench case[2] under the old s. 372 it was suggested:—"The acts imputed to the accused could not constitute an offence because they are sanctioned by the religious usages of Hindus". But the Court said: "The 372nd and 373rd sections of the Indian Penal Code were intended for the protection of minors. They involve the declaration as a matter of general law that no person under the age of majority shall be devoted to a life of prostitution nor employed in, nor used for, any unlawful or immoral purpose nor placed in a position in which it is likely such person will be employed in, or used for any such purpose.

"This rule, which is obviously suggested by the highest considerations of justice and morality, must control the exercise of all private law, even in those cases in which the private law assumes to vindicate itself on the specious plea of religion. If the terms in which the law is expressed are sufficient to include within their provisions acts done under colour of religion, those who participate in such acts are liable to the penal consequences, however laudable their motives according to the peculiar standard of morality adopted by the professors of their religion.

"The point was fully considered and decided by this Court in *Ex-parte Padmavati*[3]....The learned Judges observe: 'The argument that the treatment of such a transaction as criminal is impossible, because the Hindu religion sanctions the practice, and the private law recognizes private rights as flowing from it, is manifestly of no weight. An offence is every transgression of a Penal Law, and a rule of Penal Law is a rule of Public Law, and necessarily overrides every precept of Private Law, and cannot be affected by any argument derived from that Law... With respect to the argument from religion, it is only necessary to observe that if the precepts of a particular religion enjoin acts which transgress the rules of Penal Law, these acts will clearly be offences. Where the Legislature intended that acts which would otherwise be offences should not be so because connected with religious observances they have expressed that intention.—(Penal Code, Sec. 292)'.

"The cases in which persons have been held amenable to the penal law for participation in Sati, in Mariah sacrifices, and in the procuring of slaves, though these acts were sanctioned by the religious law of the parties implicated, show that the plea, that the practice is enjoined or allowed by the religious law of the accused, is not allowed to prevail over the injunctions of the penal law.

"The word 'allowed' is used advisedly, because the Court do not understand that the dedication of minors is anywhere enjoined. A dedication may be made after the girl has attained her age of majority. It is represented to the Court that it is only because it is regarded as a point of honour that a girl should be married before she attains puberty, that the dedication which is deemed equivalent to marriage takes place ordinarily during minority. Where the objection is founded not on a religious injunction but on a usage allowed by religion and suggested merely by sentiment, there can be no reluctance on the part of the Court so to interpret the law as to protect minors from a life considered by civilized nations as shameful".

Amendment.—The age-limit was raised to eighteen years from sixteen years by Act V of 1924, s. 2. The words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1924, s. 2.

1 Proceedings of the Legislative Assembly, dated February 11, 1924, pp. 447, 448.

2 (1881) 1 Weir 359, 360, F. B.

3 (1870) 5 M. H. C. 415, 416.

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of age at the time of the offence

(2) That the accused sold, let to hire, or otherwise disposed of such person

(3) That he did so with intent that such person should be employed or used at any age for the purpose of prostitution, or for illicit intercourse with any person or for any unlawful and immoral purpose, or with knowledge that it was likely that such person would be employed or used for any such purpose[1]

The question whether or not the disposal of the person was effected with the intention or knowledge postulated by this section, is a question of fact which must be determined according to the circumstances of each case[2]

Procedure.—Cognizable Warrant Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

Charge I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the day of — , at —, sold (*or* let to hire, *or* disposed of) a person under the age of eighteen years, to wit— [with intent that such person should at any age be employed or used for the purpose of prostitution *or* for illicit intercourse with a person to wit —, *or* for any unlawful and immoral purpose viz, (*state the purpose*)] *or* [knowing it to be likely that such minor would be employed or used for any such purpose] and thereby committed an offence punishable under s 372 of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session *or* High Court)

And I hereby direct that you be tried [by the said Court (*omit these words if the case is tried by a Magistrate*)] on the said charge

Buying minor for purposes of prostitution, etc

373. Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years[2] with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose[3], or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—Any prostitute, or any person keeping or managing a brothel, who buys, hires, or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution

Explanation II.—'Illicit intercourse' has the same meaning as in section 372.

COMMENT.

This section has been materially altered similar to s 372 The age limit was raised to eighteen years from sixteen by Act V of 1924, s 2 The words "person

[1] See *Lal*, (1880) 2 All 694 F B, *Khushala*, P R No 13 of 1901, P L R No 114 of 1901 (1880) P R No 27 of 1880, *Durga Das*, (1904) [2] (1881) 1 Weir 359, F B

under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1921, s. 2. Explanations I and II were also added by s. 4 of the same Act.

This section applies to a case of buying or hiring or other similar transaction by which possession of a person under eighteen years of age is obtained with the intention of employing or using that person for prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose. It includes both males and females under the age of eighteen years. It is a counterpart of s. 372.

Sections 372 and 373.—Both the sections relate to the same subject-matter. The former contemplates an offence committed by the person who 'sells, lets to hire, or otherwise disposes of' any person under the age of eighteen years, with the requisite intent or knowledge. The latter relates to the case of the person who 'buys, hires, or otherwise obtains possession of' any person under the age of eighteen. Section 372 strikes at any bargain of the nature contemplated by it, whoever may be the party who sells or lets the person, even though it should be the father, mother, or lawful guardian. Section 373 strikes at the bawds, keepers of brothels, and all others, who fatten on the profits arising from the general prostitution of the girls.

Ingredients.—The section requires the following essentials—

1. Buying, hiring or otherwise obtaining possession of a person.
2. The person should be under the age of eighteen years.
3. The buying, hiring, or otherwise obtaining possession must be with intent or knowledge of likelihood that the person shall at any age be employed or used for

   (*i*) the purpose of prositution, or
   (*ii*) illicit intercourse, or
   (*iii*) any unlawful and immoral purpose.

1. 'Buys, hires, or otherwise obtains possession'.—It is not essential to the offence that the buying, hiring, or otherwise obtaining of the possession of the person should be from a third person. The language of the section is quite applicable to an agreement or understanding come to with the person without the intervention of a third person, and the vice against which the section is directed is certainly not of any less enormity in the latter case.

Scotland, C. J., observed in *Dawlath Bee* v. *Shaik Ali*[1]: "But to bring a case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession whether ostensibly for a proper purpose or not. The words 'buys' and 'hires' convey that meaning according to their ordinary acceptation, and, giving them due effect it seems to me that the associated words 'or otherwise obtains possession' were not intended to do more than include other modes of obtaining the same kind of possession as that of a buyer or hirer. This, I think, is shown more clearly to be the meaning intended by the provision which follows as to the other essential of the offence—the intent or knowledge of its being likely 'that such minor shall be employed or

1 (1870) 5 M. H. C. 473, 475; *Maddila Mutyalu*, (1918) 35 M. L. J. 157, 24 M. L. T. 77; *Nga Shwe Thwe*, (1907) U. B. R. (1907-9) (P. C.) 1, 13 Burma L. R. 389; *Ganga*, (1897) 11 C. P. L. R. (Cr.) 6.

used for the purpose of prostitution or for any unlawful and immoral purpose', indicating plainly as it does an employment or use of the minor at some time future to the obtaining of possession —its effect is to my mind strong to show that complete possession and control of the minor's person obtained by buying, hiring or otherwise with the intent or knowledge that, by the effect of such possession and control, the minor should or would afterwards be employed or used for either of the purposes stated is what the section was intended to make punishable as a crime The provision seems to me to exclude the supposition that an obtaining of possession in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section The present section expressly overrules this view as it contains the words illicit intercourse with any person ' which were not in the old section

'Possession' means possession with a power of disposal

The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge , of the girl is accomplished

This section does not specify the nature of the possession, nor its duration nor intensity It merely specifies the object, namely, prostitution or illicit intercourse, whether in each case, the possession is such as to be consistent with the purpose or intention or knowledge of prostitution or illicit intercourse— is the only test which in law is necessary and sufficient[1]

A person taking possession of a girl under eighteen years for the purpose indicated in the section will be liable even though there is no one who has given him the possession of the girl but he himself has taken possession of her An offence under the previous section is not necessary for a conviction under this section It is not necessary that the possession of the girl should be obtained from a third person[2]

Where the accused is proved to have obtained possession of a female under the age of eighteen years and is proved to be a person who occupies or manages a brothel, then he is to be presumed to have obtained possession of that girl with the intent that he shall use her for the purpose of prostitution The onus is cast upon the accused under explanation I to rebut this presumption that he had obtained possession of the girl with intent that she should be used for prostitution[3]

2 **'Person under the age of eighteen years'.**—The age limit was raised to eighteen years by Act V of 1924, s 2

3. **'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose'.**—Proof of intention or knowledge [illegible]

ledge, the employment that was intended or known to be likely was to take place [illegible]

years[6] The present section speaks of employment or use 'at any age'. The Calcutta and Allahabad cases and the earlier rulings of the Madras High Court are, therefore, no longer of any authority

1 [illegible], (1928) 30 Bom L. R. 613, 52 Bom, 4 [illegible] Bom Cr C. 282.
2 *Shamsuddin* (1920) 45 Bom 520, 22 Bom L. R. 1234 5 Bom Cr C 279
3 *Chiragh* (1929) 30 P. L. R. 414
4 *Karuna Baidob*, (1894) 22 Cal. 164, 172; *Khetramani Dasi*, (1902) 33 C. L. J 431. *Ramasamy* (1889) 12 Mad. 273 *Chanda*, (189) 18 All 21
5 *Kamalakshi v. Ramasami Chetti*, (1895) 19 Mad 127, 135.
6 *Annammal*, [1913] M W. N 2[illegible] 24 M L. J 211 13 M. L. T 131

'For the purpose of prostitution'.—Prostitution means the surrender of a girl's chastity for money[1]. "Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that...is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that... must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary"[2].

'Illicit intercourse with any person'.—The meaning of 'illicit intercourse' is explained in explanation II to s. 372. See Comment on s. 372. Cases which laid down that no offence is committed if employment for prostitution is not habitual are no longer of any authority[3].

'Unlawful and immoral purpose'.—Section 372 and this section do not "prohibit by punishing a transaction in which the employment or use contemplated is for a purpose that is merely unlawful or for a purpose that is merely immoral, except the purpose of prostitution. No transaction of the kinds described in these sections, with the exception just noted, is an offence under these sections, unless the purpose of the contemplated use of the minor is both unlawful and immoral"[4].

Amendment.—The word 'eighteen' was substituted for 'sixteen' by Act V of 1924, s. 2, before the section was altered by Act XVIII of 1924.

CASES.

Selling and buying a girl for prostitution.—A, the father of two girl-twins about a year old, sold them to a prostitute for Rs. 23. He and the prostitute confessed to the guilty knowledge and intent with which the transaction was made. It was held that A was guilty of an offence under s. 372 and the prostitute under this section[5]. In a charge against a dancing girl for having purchased a girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under this section, it was held that there was evidence to support it[6].

Obtaining possession of a girl for prostitution.—A minor married girl was brought, with the consent of her husband, by accused No. 2 from Kashmir to Bombay at the expense of accused No. 1, a brothel-keeper. On her arrival in Bombay, the girl was kept in the brothel, and her earnings were divided half and half by the two accused. It was held that what took place in Kashmir was only a preparation for committing the offence, which was completed in Bombay, and the accused were guilty under ss. 373 and 114[7]. Where a brothel-keeper allowed a girl under eighteen years of age to visit the brothel for two or three hours in the night and allowed her to prostitute herself to customers for money, it was held that the brothel-keeper committed an offence punishable under this section[8].

1 *Moon*, [1910] 1 K. B. 818, 820.
2 Per Scotland, C. J., in *Dowlath Bee* v. *Shaik Ali*, (1870) 5 M. H. C. 473, 476.
3 *Dowlath Bee* v. *Shaik Ali*, *ibid*; *Nourjan*, (1870) 6 Beng. L. R. App. 34, 14 W. R. (Cr.) 39; *Sukee Raur*, (1893) 21 Cal. 97; *Ahmedkhan*, (1898) Unrep. Cr. C. 962, Cr. R. 16 of 1898; *Bhutia*, (1875) 7 N. W. P. 295; *Hardeo*, (1879) P. R. No. 7 of 1880; *Maddilla Matyalu*, (1918) 35 M. L. J. 157, 24 M. L. T. 77.
4 Per Plowden, J., in *Mula*, (1888) P. R. No. 13 of 1888, p. 20.
5 *Karuna Baistobi*, (1894) 22 Cal. 164.
6 *Papa Sani*, (1894) 23 Mad. 159; *Bhagirath*, (1900) 20 A. W. N. 133; *Musammat Sunder*, (1904) 1 A. L. J. 559.
7 *Batubai*, (1927) 29 Bom. L. R. 490, 9 Bom. Cr. C. 65.
8 *Vithabai Sukha*, (1928) 30 Bom. L. R. 663, 52 Bom. 403, 9 Bom. Cr. C. 283.

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of age at the time of the offence

(2) That the accused bought, hired, or obtained possession of, such person

(3) That he did so with intent that such person shall at any age be employed or used for the purpose of prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose, or with knowledge that it was *likely that such person would be employed or used for any such purpose*

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

Charge.—See s 372

Unlawful compulsory labour

374. Whoever unlawfully compels any person[1] to labour against the will[2] of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

COMMENT.

Object—This section is intended to prevent abuses arising from forced labour which ryots were sometimes compelled to render to landlords

Ingredients—The section requires two essentials—

1 Unlawful compulsion of any person

2 Such compulsion must be to labour against the will of that person

1 **'Unlawfully compels any person'.**—"I do not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she [illegible] ot working [illegible] prisonment [illegible] s 374"[1] [illegible] ted to him [illegible] off their [illegible] were fed by the accused as his servants, and he insisted on their working for him, and punished them by beating them if they did not do so, it was held that a conviction under this section could not be upheld[4]

2 **'To labour against his will'**—The word 'labour' will apply either to mental or to bodily labour, though probably the latter was principally contemplated by the framers of the Code

PRACTICE.

Evidence—Prove (1) that the accused compelled the person [illegible] labour

(2) That such compulsion was unlawful

(3) That the accused did so against the will of that person

Procedure—Not cognizable—Warrant—[illegible]—[illegible]—Triable by any Magistrate

1 Per Fetherstonhaugh C. J., in *Malan Mahton* [illegible] (18[illegible]) 19 Cal [illegible]

[illegible] J., (S[illegible]) [illegible]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, unlawfully compelled AB to labour against his will and thereby committed an offence punishable under s. 374 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Rape.

Rape.

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse[1] with a woman under circumstances[2] falling under any of the five following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

[*Sexual intercourse by a man with his own wife is not rape although the wife has not attained the age of thirteen years, if he was married to her before the date on which this Act comes into operation and she had attained the age of twelve years on that date.*]†

Punishment for rape.

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

In the definition of rape, the first clause operates, where the woman is in possession of her senses, and therefore capable of consenting; the second, where she is insensible whether from drink or any other cause, or so imbecile that she is

† This is enacted by s. 4 Act XXIX of 1925 which came into force on September 22, 1925.

incapable of any rational consent; the third and the fourth, where there is consent, but it is not such a consent as excuses the offender, because in the one case it is extorted by putting the woman in fear, and in the other, it is obtained by deception of a particular kind, and the fifth, where the intercourse is with a girl so young that consent is immaterial.

English law.—A boy under fourteen years of age cannot, by law, be convicted of feloniously carnally knowing and abusing a girl under ten years old, even though it be proved that he has arrived at the full state of puberty[1]. The rule at common law is that in regard to the offence of rape *malitia non supplet aetatem*, a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence[2]. But a boy under fourteen can be convicted of an indecent assault under the Criminal Law Amendment Act[3]. The presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of fourteen years has no application to India[4].

Ingredients.—This section requires two essentials—

1. Sexual intercourse by a man with a woman.
2. The sexual intercourse must be under circumstances falling under any of the five clauses in the section.

1 'Sexual intercourse'.—The sexual intercourse must be with a woman. The term man is defined as a male human being of any age (s. 10). The term woman is defined as a female human being of any age (s. 10).

2 'Under circumstances'.—*The five clauses of the section denote the circumstances which render the sexual intercourse an offence under this section.*

Second clause.—**Without her consent**.—Consent of the woman should have been obtained prior to the act. It is no defence that the woman consented after the fact[5]. As to the elements which make a consent void, see s. 90 *supra*.

The fact that the girl was *virgo intacta* up to the date of the occurrence is very strong proof against the intercourse having taken place with the consent of the girl[6].

Stephen, J., in *R. v. Clarence* says: "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case it is difficult to say that the prisoner was [illegible] rape is having connection with a woman [illegible] consent every case in which a man infect[illegible] wife being ignorant of the first marriage [illegible] case of rape. Many [illegible] would be rapes and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the [illegible] of the person who does the act[7]."

A sleeping person can never consent. Where, therefore, a man had connection with a woman while she was asleep he was held to have [illegible] rape[8].

1 *Jordan* (1839) 9 C. & P. 118.
2 Per [illegible] in *Waite* [1892] 2 Q.B. 600, 601.
3 48 & 49 Vic. c. 69, s. 4, 9; *Williams* [1893] 1 Q.B. 320.
4 [illegible] (191[illegible]) [illegible]
5 1 Hawk P.C., p. 122.
6 *Sa*[illegible] (192[illegible]) [illegible] Cr. L.J. [illegible]
7 (1888) 22 Q.B.D. 23, [illegible]
8 *Mayers* (1872) 12 Cox C.C. 311.

Consent of a girl under ten was held to be quite immaterial where the charge was for *attempt to commit rape. Consent means a willing mind on the part of the girl to allow the act to be done.* If from her tender years, not knowing what was being done, she merely submits *without the exercise of any will by her,* it will not amount to a consent[1].

Consent given by a woman *of unsound mind is of no avail* (s. 90). Where, therefore, a man had carnal knowledge of a girl of imbecile mind, and the jury *found that it was without her consent, she being incapable of giving consent from* defect of understanding, it was held that his act amounted to rape[2]. But there *must be evidence that the connection was against the will or without the* consent of the woman[3]. However, if the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and the accused had connection with her consent, he ought to be convicted[4].

Similarly, *consent given by an intoxicated woman is of no avail.* Where the accused made a girl of thirteen years quite drunk, and whilst she was insensible violated her person, he was held to have committed rape[5].

Passive non-resistance or consent obtained by fraud.—If a girl does not resist intercourse in consequence of misapprehension, this will not amount to a consent on her part. Where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she mak[illegible]ng no resistance from a bona fide belief that he was treating her medically, it [illegible] held that he could be convicted of rape[6]. Similarly, where the accused pr[illegible] *to give medical advice for money, and a girl of nineteen consulted him with* [illegible] to illness from which she was suffering, and he advised that a surgical op[illegible] should be performed and, under pretence of performing it, had carnal inte[illegible] with her, it was held that he was guilty of rape[7]. The accused who was e[illegible] to give lessons in singing and voice production to a girl of sixteen years of ag[illegible] sexual intercourse with her under the pretence that her breathing was not [illegible] right and that he had to perform an operation to enable her to produce her [illegible] properly. The girl submitted to what was done under the belief, wilfully [illegible] fraudulently induced by the accused, that she was being medically and surgi[illegible] treated by the accused and not with any intention that he should have se[illegible] intercourse with her. It was held that the accused was guilty of rape[8].

"*That consent obtained by fraud is no consent at all is not true as a* gen[illegible] proposition either in fact or in law. If a man meets a woman in the street [illegible] knowingly gives her bad money in order to procure her consent to intercourse w[illegible] him, he obtains her consent by fraud, but it would be childish to say that she [illegible] not consent"[9].

Third clause.—The mere fact that a woman submits through fear does not take the offence out of the category of rape[10].

The fear must be of death or hurt. 'Hurt' is defined in s. 319, *supra.*

Fifth clause.—There may be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. Instances of abuse by the husband in such cases will fall under this clause.

The age-limit was raised from ten to twelve years by Act X of 1891 for the following reasons: "The limit at which the age of consent is now fixed (*i.e.*, ten

1 *Beale*, (1865) 35 L. J. (M. C.) 60; *Asadali*, (1927) 9 P. L. T. 186.

2 *Fletcher*, (1859) 8 Cox 131; *Pressy*, (1867) 10 Cox 635.

3 *Fletcher*, (1866) L. R. 1 C. C. R. 39.

4 *Barratt*, (1873) L. R. 2 C. C. R. 81; *Ryan*, (1846) 2 Cox 115.

5 *William Camplin*, (1845) 1 Cox 220, *Ryan*, *ibid.*

6 *William Case*, (1850) 4 Cox 220.

7 *Flattery*, (1877) 2 Q. B. D. 410.

8 *Williams*, [1923] 1 K. B. 340.

9 Per Wills, J., in *Clarence*, (1888) 22 Q. B. D. 23, 27.

10 *Akbar Kazee*, (1864) 1 W. R. (Cr.) 21.

years) favours the premature consummation by adult husbands of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child wives and of physical deterioration in the community to which they belong"[1]

It was raised from twelve to fourteen years by Act XXIX of 1925, s. 2, for the following reasons "Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen Even though puberty may be reached at that age, it is obvious that girls are unfit for sexual cohabitation till they are older and more developed in physique and strength The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls It is therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years"[2]

By raising this limit female children are protected (a) from premature cohabitation[3], and (b) from immature prostitution

The accused a youth of about eighteen, had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age, the girl did not consent, her vagina was ruptured and, as a result, she died of shock, it was held that the accused was guilty of rape[4]

Explanation.—The explanation says that penetration is sufficient to constitute rape To constitute penetration it must be proved that some part of that virile member of the accused was within the labia of the pudendum of the woman, no matter how little[5] The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman It is not necessary to decide how far they entered[6] It is not essential that the hymen should be ruptured provided it is clearly proved that there was penetration[7] even though partial[8], but where that which is so very near the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape[9] In *Reg* v *Ferroll* Green, J, directed the jury that vulval penetration only was sufficient, under the law of India, to constitute rape without actual seminal emission In this case the accused was charged with rape on a child six years old The child had not complained, and admitted on cross-examination that she had not been hurt The medical evidence proved there was no injury to the parts The child was found to be suffering from gonorrhoea so was the accused It was clear that the penetration (if any) had been only vulval Green, J, directed the jury that this was sufficient to constitute rape, and the accused was convicted of rape[10]

Where no penetration is attempted or intended the act is not punishable under this section[11]

Exception.—The age-limit was raised to thirteen years by Act XXIX of 1925, s. 2. Section 4 of this Act further enacts that 'sexual intercourse by a man with his own wife is not rape although the wife has not attained the age of thirteen years if she was married to him before the date on which this Act comes into operation and she has attained the age of twelve years on that date". The Act came into force on September 23, 1925

[1] [illegible] Gazette of India, 1891, Part V [illegible]
[2] [illegible] Gazette of India, 1925, Part V [illegible]
[3] [illegible] Hyder [illegible] 4 Cal 41
[4] [illegible]
[5] [illegible]
[6] [illegible]
[9] C & P 24 [illegible]
[7] [illegible] Hughes [illegible]
[8] Abdul [illegible]
[9] [illegible]
[10] [illegible]
[11] [illegible] 292

A man cannot be guilty of rape on his own wife when she is over the age of thirteen years, on account of the matrimonial consent she has given which she cannot retract. But he has no right to enjoy her person without regard to the question of safety to her[1]. A husband can be guilty of abetment of rape by another on his wife. This was held in the notorious case of Lord Audley who held his wife by force while his butler ravished her[2].

Difference between an indecent assault and an attempt to commit rape.—An indecent assault upon a woman does not amount to an *attempt to commit rape*, unless the Court is satisfied that there was a determination in the accused to gratify *his passion at all events*, and in spite of all resistance[3]. An assault with intent to commit a rape is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force. On an indictment, for an assault, with intent to commit a rape, the prosecutrix stated that the accused, her medical man, being in her bed-room, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the accused was proceeding to have a criminal connection with her, upon which she instantly raised herself up, and ran out of the room. She stated that the defendant had penetrated her person "a little". It was held that if it had appeared that the accused had intended to have had a criminal connection with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but that the getting possession of the person of the woman by surprise was not an assault with intent to commit rape, but was an assault[4]. Where the accused stripped a girl nearly naked and was lying upon her when her cries attracted people to the spot, it was held that he was guilty of an attempt to commit rape and not merely of an offence under s. 354[5]. A female child aged five and a half years was discovered seated on the naked thighs of the accused who was a lad of eighteen years. The accused had taken off his own trousers and that of the girl. On medical examination of the girl it was found that with the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury and her hymen was intact. There were no marks of blood or semen on her person and she did not complain of having felt any pain as the result of the accused's assault upon her. It was held that under the circumstances the accused was guilty of an attempt to commit rape and not merely of an indecent assault[6].

Physical incapacity.—The Bombay High Court has held that a person physically incapable of committing the offence of rape cannot be held guilty of an attempt to commit it[7]. The former Chief Court of Lower Burma had expressed its dissent from this view and had laid down that a boy of twelve could be convicted of an attempt to commit rape[8].

Amendment.—The age-limit was raised to fourteen years in cl. (5) and to thirteen in the Exception to the section by Act XXIX of 1925, s. 2. The provisos to s. 376 was also added by s. 3 of the same Act.

PRACTICE.

Evidence.—Prove (1) that the accused had sexual intercourse with the woman in question.

(2) That the act was done under circumstances falling under any of the five descriptions specified in s. 375.

1 *Hurree Mohun Mythee*, (1890) 18 Cal. 49.
2 *Lord Audley's* case, (1631) 3 St. Tr. 401.
3 *Shankar*, (1881) 5 Bom. 403; *James Lloyd*, (1836) 7 C. & P. 318; *Wright*, (1866) 4 F. & F. 967.
4 *Peter Stanton*, (1844) 1 C. & K. 415.
5 *Khadam*, (1910) P. W. R. (Cr.) No. 42 of 1910; *Kishen Singh*, (1927) 28 Cr. L. J. 663.
6 *Mehraj Din*, (1927) 28 Cr. L. J. 244.
7 *Gopala bin Rama*, (1896) Unrep. Cr. C. 865.
8 *Nga Tun Kaing*, (1917) 11 B. L. T. 135; *William*, [1893] 1 Q. B. 320.

(3) That such woman was not the wife of the accused, or, if she was his wife, she was under thirteen years of age

See s 1 of Act XXIX of 1925 which acts as a proviso

(4) That there was penetration

The best evidence of the age of the person violated ought to be produced[1].

The following rules have been adopted for thirty years in Neapolitan Jurisprudence, namely, that in an accusation of rape there must be full proof of these facts—

(1) That there has been constant and equal resistance on the part of the person violated

(2) That there is inequality of strength between the parties

(3) That she has raised cries

(4) That there may be some marks of violence present

Three questions relating to this offence have been discussed—

(1) Whether the presence of venereal disease in the female violated is in favour of or against her accusation? If marks of disease are recent, in favour of her, but it must be remembered that symptoms of infection do not appear until three days after receiving it. Should appearances indicate disease of longstanding they weaken her complaint

(2) Can a female be violated during her sleep without her knowledge? If sleep has been caused by narcotics, intoxication, or syncope, or excessive fatigue, it is possible

(3) Does pregnancy ever follow rape? Great diversity of opinion. It was formerly supposed that if a woman conceived it was no rape, it is now admitted that such an opinion has no sort of foundation

Potency to be proved—In India the potency of a person charged with this offence has to be proved by evidence in each case, as, unlike the English law, there is no limit of age laid down under which the law presumes a person to be physically incapable of committing rape[2]

Evidence of previous connection—On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connection with the accused prior to the alleged assault, evidence to contradict her by proving such prior connection is admissible on his behalf[3]. The prosecutrix in an indictment for an indecent assault which on the facts alleged amounted to an attempt to rape, was asked in cross examination whether she had not previously had connection with a man other than the accused, and denied it. It was held that she could not be contradicted[4]. She can be cross examined as to particular acts of connection with other men but if he denies it she cannot be contradicted[5]. When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character (s 155 (4) of the Indian Evidence Act)

Dying declaration—The dying declaration of a deceased person is admissible in evidence on a charge of rape[6]

Complaint of prosecutrix—Evidence of the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the accused be given on the part of the prosecution, not as being evidence on the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part[7]. The

1 *James Welsh*, (1832) 5 C & P. 298.
2 *Gopi'thin Lama* (189-) Unrep. Cr C 863.
3 *Riley* (1887) 18 Q B D 481
4 *Holmes* (1871) L R 1 C C R 334
5 *Cockcroft* (1870) 11 Cox 410
6 *Pitambajon Hal lenger*, (19-) 6 W R (Cr) 75.
7 *Lillyman*, [1896] 2 Q B 167, *Fred* & *Reed*, (1877) 14 Cox 46.

accused was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the accused, as to why the girl had not waited for the other child at the accused's house. The girl's reply was a complaint of the accused's conduct to her. It was held that the evidence was admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct[1]. Where a person indecently assaulted makes a complaint, not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule laid down in the above case, cannot be given in evidence[2]. In rape, not only what the prosecutrix said immediately after the occasion but what was said in answer to her is evidence[3]. See also illustration (j) to s. 8 of the Indian Evidence Act.

In cases of rape, where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped[4]. It is very unsafe to convict in a case of rape on the uncorroborated evidence of the woman. Where the woman had intercourse with some person but showed no signs of force having been used, and had reported to several persons, this was held to be not substantial corroboration of her evidence[5]. The first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts[6].

Where the only evidence was that of the complainant and there was no evidence of penetration, the conviction was altered to one under s. 354[7].

Collateral evidence in confirmation or otherwise.—It is no mitigation of this offence that the woman at last yielded to the violence, if such consent were forced from her by fear of death or by duress. Nor is it any excuse...that the woman consented after the fact, nor that she was a common strumpet; for she is still under the protection of the law and may not be forced: nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher; for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment[8].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

If the sexual intercourse was by a man with his own wife not being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Chief Presidency Magistrate or District Magistrate.

If the sexual intercourse was by a man with his own wife being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session.

False charge of rape.—Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. The offence, therefore, of making false charge of rape is triable exclusively by the Court of Session[9].

Sections 366 and 376.—Where an accused is convicted under s. 366 and 376, it is not illegal to pass separate sentences for each of the offences inasmuch as the offences are separate and the charge under s. 366 involves elements different from a charge under s. 376[10].

1 *William Osbourne*, [1905] 1 K. B. 551.
2 *Merry*, (1900) 19 Cox 442.
3 *Eyre*, (1860) 2 F. & F. 579.
4 *Kanshi Ram*, (1921) P. W. R. (Cr.) No. 11 of 1922; *Beli Singh*, (1927) 9 L. L. 337.
5 *Maung Ba Tin*, (1926) 5 B. L. J. 112.
6 *Mahla Ram*, (1923) 25 Cr. L. J. 74.
7 *Jalal*, (1929) 11 L. L. J. 391.
8 See Roscoe's Criminal Evidence, 14th Edn., p. 974; Archbold, 26th Edn., p. 1019.
9 *Bhikhi*, (1898) Unrep. Cr. C. 953.
10 *Ghulam Muhammad*, (1926) 28 Cr. L. J. 136; *T.k Singh*, (1927) 29 Cr. L. J. 248.

Punishment —The offence is capable of degrees On the one hand let us take the case of the chaste high caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of low caste, On the other hand that of the woman without character, or any pretension to purity who is wont to be easy of access in the latter case if the woman, from any motive, refuses to comply with the solicitation of a man and is forced by him, the offender ought to be punished, but surely the injury is infinitely less in this instance than in the former[1] But in a case it has been remarked that the measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime the conduct of the criminal, and the defenceless and unprotected state of the injured female[2] The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted[3] But where a girl is of unchaste character a very severe sentence is not called for[4]

Crimes of violence upon women should be severely dealt with[5]

Under ss 57, 376 and 511 a sentence of ten years transportation, or of fifteen years' rigorous imprisonment may be passed for the offence of attempt to commit rape, but a sentence of seven years rigorous imprisonment commutable under s 59 to seven years transportation is illegal[6]

As to whipping, see the Whipping Act[7]

As to crimes on the frontier see the Frontier Crimes Regulation, 1901, ss 6, 11 (3) (*d*) and 12 (2)

Charge —I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows —

That you, on or about the——day of——, at——, committed rape on AB [illegible]

Of Unnatural Offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal[1], shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Unnatural offences

Explanation —Penetration[2] is sufficient to constitute the carnal intercourse necessary to the offence described in this section

COMMENT

This offence consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast

According to the English law if the party on whom the offence is committed be within the age of discretion, namely, under fourteen, it is not felony in him,

1 Law Commissioners' First Rep., s. 419
2 *Jhantah Noshya*, (1866) 6 W. R. (Cr) 53
3 *Pyarelal* (1917) 20 Cr. L. J. [illegible]
4 *Ibrahim* (1927) 28 Cr. L. J. 236
5 *Kala* (1929) Cr. C. (Lah.) 130
6 *Joseph Merasa*, (1865) 10 W. R. (Cr) 10
7 Act IV of 1909 s. 4 (a) A sentence of fifteen stripes for the offence of rape was held to be inadequate in the case of a juvenile offender in [illegible] (1914) 8 L. B. R. 143

but only in the agent. If both be of the age of discretion, it is felony in both[1]. A man who, as pathic, committed sodomy with a boy of the age of twelve years, was convicted of this offence, though the boy was discharged[2].

A married woman who consents to her husband's committing an unnatural offence with her is an accomplice[3].

1. **'Voluntarily has carnal intercourse against the order of nature with any man, woman or animal'.**—*As to the definition of 'voluntarily', see s. 39; of 'man', s. 10; of 'woman' s. 10; of 'animal', s. 4.*

Coitus per os (the sin of Gomorrah) is punishable under this section[4]. Kennedy, A. J. C., observed in this case: "Is the act here committed one of carnal intercourse? If so it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible. Intercourse may be defined as mutual frequentation by members of independent organizations. Commercial intercourse provides for the merchants of the state A who wish to come to and trade in the state B, not intending permanently to settle there but with *animus revertendi* to A, and similarly for the merchants of the state B. Such is the *Magnus Intercursus* which regulated the trade of Britain and Flanders in the middle ages. Social intercourse provides the rules under which member of one family may resort to the premises occupied by another family, not intending to reside in such premises but merely to visit them for laudable purposes, reciprocity being of the essence of the bargain. By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organization, for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that the sin of Gomorrah is no less carnal intercourse than the sin of Sodom. The sin of Lesbos or Tribadism is clearly not such intercourse, and I doubt if mutual cheirourgia would be such...And it was this vice in particular which was rendered punishable by the early Christian state, for it was par excellence the vice of the Hellene and the Saracen. By making this vice particularly punishable therefore the State not only protected good morals but struck at its enemies. It is this vice therefore which attracted the severest censures of State and Church, but in mediaeval times all emission other than in *vas legitimum* was considered unchristian because such omission was supposed ultimately to cause conception of demons. It will be seen how little help can be extracted from Christian sources in deciding this question. But why is it that most modern states, now freed from the influence of superstition, still make the sin on Sodom punishable. Partly I suppose because of the desire of Princes to encourage legitimate marriage. Partly because there is an idea, (perhaps erroneous) that the public or tolerated practice of that vice creates a tendency in the citizens of the state, where it is practised to adopt an unmanly and morbid method of life and thinking, so that a person saturated with those ideas is less useful as member of society, partly because of the danger that men put in authority over other men may use their power for the gratification of their lusts but principally I suppose because of the danger to young persons, lest they be indoctrinated into sexual matters prematurely. But surely all these ill consequences would equally follow in a city where the sin of Gomorrah was tolerated...But we must not allow our disgust at the perpetrators of such acts to blind us to the fact that this vice is less pernicious than the sin of Sodom. It has

[1] 1 East P. C. 480; 1 Hale P. C. 670.
[2] *Allen*, (1849) 3 Cox 270.
[3] *Jellyman*, (1838) 8 C. & P. 604.
[4] *Khanu*, (1924) 19 S. L. R. 327.

not been surrounded by the halo of art eloquence and poetry It cannot be practised on persons who are unwilling It is not common and can never be so It cannot [illegible] th [illegible] rts

and proceeded to a completion of his lust, it was held that this did not constitute the offence of sodomy[2] This decision proceeded upon a special statute which punished the crime of buggery Under the Penal Code such an act will come under the provisions of this section

The accused was indicted for an unnatural offence committed on board of an East India ship lying in St Katherine s Docks His defence was that he was a native of Baghdad and his act was not considered to be an offence there It was held that this was not a good defence[3]

A domestic fowl is an animal and an attempt to commit an unnatural offence with such fowl will be punishable under this section[4]

2 **'Penetration**—See s 375 *supra* The crime is complete if the Court is satisfied that penetration took place[5]

PRACTICE

Evidence—Prove (1) that the accused had carnal intercourse with a man woman or animal

(2) That such intercourse was against the order of nature

(3) That the accused did the act voluntarily

(4) That there was penetration

It is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed unless for any reasons that testimony is entitled to special weight[6] A charge of attempting to commit sodomy is very easy to bring and very difficult to refute the evidence in support of such a charge has to be very convincing in order to convict the accused[7]

Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session Presidency Magistrate or Magistrate of the first class

Insufficient particulars in a charge—Where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when the place where or point to any known or unknown person with whom the offence was committed and without any proof of these particulars the facts proved against him only being that he habitually wore woman s clothes and exhibited physical signs of having committed the offence it was held that the conviction was not sustainable[8]

Charge—I (*name and office of Magistrate etc*) hereby charge you (*name of accused*) as follows —

That you on or about the——day of—— at——, had carnal intercourse against the order of nature with a certain man [*or* woman] to wit—, [*or* with a certain animal to wit (*specify the kind of animal*)] and thereby committed an offence punishable under s 377 of the Indian Penal Code and within my cognizance [*or* cognizance of the Court of Session (*or* High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

[1] *Khanu* (1924) 19 S. L. R 327 pp. 328 329 330-33

[2] *Samuel Jacobs* (1817) R. & R 331 In a Madras case it is considered doubtful whether the act of having connection with a woman in the mouth amounts to this offence (*Govindarajula Naidu* (1886) 1 Weir 382. Will this not be carnal intercourse against the order of nature? If it is the act will amount to an offence under the section.

[3] *Jacp* (183) 7 C & P 436

[4] *Brown* (1889) 24 Q B D 357

[5] *Elbert Lock pear* (1832) 1 Mood 342

[6] *Carpet* (1918) [illegible] W. L (Cr) [illegible] 1918

[7] *Ganu Das* (1927) 27 L. L [illegible]

[8] *Khairati* (1884) 6 All 204 [illegible]

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

THE following offences affect property:—

1. Theft.
2. Extortion.
3. Robbery and Dacoity.
4. Criminal Misappropriation of Property.
5. Criminal Breach of Trust.
6. Receiving of Stolen Property.
7. Cheating.
8. Fraudulent Deeds and Dispositions of Property.
9. Mischief.
10. Criminal Trespass.

Of Theft.

378. Whoever, intending to take dishonestly[1] any moveable property[2] out of the possession of any person[3] without that person's consent[4], moves[5] that property in order to such taking, is said to commit theft.

Theft.

Explanation 1.[6]—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft: but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.[7]—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move every-thing which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

ILLUSTRATIONS.

(*a*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(*b*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(*c*) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(*d*) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits [illegible]

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and [illegible] which A knows to belong to Z, her husband. Here it is probable that A [illegible] conceive that Z's wife is authorized to give away alms. If this was A's [illegible] A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, [illegible] knows to belong to her husband Z, and to be such property as she has [illegible] from Z to give. If A takes the property dishonestly, he commits [illegible]

(p) A, in good faith, believing property belonging to Z to be A's [illegible] takes that property out of B's possession. Here, as A does not take [illegible] he does not commit theft.

379. Whoever commits theft shall be [illegible] imprisonment of either descrip[illegible] which may extend to three [illegible] or with both.

Punishment for theft

COMMENT.

The offence of theft under the Penal Code [illegible] known as larceny in the English law

English law.—Larceny is the wilful and wrongful taking away of the goods of another against his consent and with the intent to deprive him permanently of his property.

Differences between larceny and theft.—(1) Under larceny, the stolen property should be the property of some one; whereas under theft, it should be in the possession of some one.

(2) Under theft, everything becomes its object which is moveable, i.e., capable of being severed from its place. Hence, it is theft to sever and remove things which are attached to the ground such as trees, vegetables, etc[1]. In larceny, no offence is committed if the objects removed "savour of the realty, and are, at the time they are taken, part of the freehold." So strict was this rule at common law that a larceny could not be committed of title-deeds[2].

(3) Under larceny, it is necessary to show an intention to appropriate a chattel and exercise an entire dominion over it. If it be taken with the intention of making a temporary use of it only, and then of letting the owner have it again, there is no larceny[3]. Under theft it makes no difference that the person does not intend to assume entire dominion over the property taken, or to retain it permanently[4].

(4) Under larceny, it must be shown that the taking was against the person's consent and was not only wrongful and fraudulent, but was also "without any colour of right"; under theft, it will be sufficient to show that it was without his consent.

(5) To constitute theft it is not necessary to prove that the thief ever had the stolen thing in his power, but there can be no larceny, even if there has been an actual removal, if the offender has never had the thing in his power.

(6) Theft may be committed though the person from whom the thing is taken has no title thereto; in the case of larceny the alleged owner should have some (general or special) ownership of it, and it must have been taken out of the owner's actual or constructive possession.

Ingredients.—In order to constitute theft five factors are essential:—

(1) Dishonest intention to take property.
(2) The property must be moveable.
(3) It should be taken out of the possession of another person.
(4) It should be taken without the consent of that person.
(5) There must be some removal of the property in order to accomplish the taking of it.

1. 'Intending to take dishonestly'.—Intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person[5]. Where, therefore, the accused, acting bona fide in the interest of his employers, finding a party of fishermen poaching on his master's fisheries took charge of the nets, and retained possession of them, pending the orders of his employers, it was held that the accused was not guilty of theft[6]. The intention to take dishonestly must exist at the time of the moving of the property (*vide* ill. (*h*)). If the act done is not done *animo furandi*, it will not amount to theft[7]. Where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate

1 Explanation 1; *Shivram*, (1891) 15 Bom 702.
2 1 Hale P. C. 510.
3 *Trebilcock*, (1858) 27 L. J. (M. C.) 103; *William Holloway*, (1848) 1 Den. 370.
4 *Nagappa*, (1890) 15 Bom. 344, 346.
5 *Madaree Chowkeedar*, (1865) 3 W. R. (Cr.) 2, 3.
6 *Nobin Chunder Holdar*, (1866) 6 W. R. (Cr.) 79. See *Sheomeshur Rai*, (1888) 8 A. W. N. 97.
7 *Thomas Bailey*, (1872) L. R. 1 C. C. R. 347.

intention of restoring the thing to him without exacting or expecting any recompense, the detention does not amount to causing wrongful loss in any sense[1]. Otherwise, a person keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest for the purpose of causing him a little anxiety or in earnest for the purpose of teaching him the salutary lesson of being careful, will be guilty of theft, a result which the legislature could never have intended. Where the accused found the complainant's pony at large, not within the compound or the stable of the complainant, it having broken from its tether to which it had been tied th [illegible] and took a ride on it, returning home on th [illegible] was held that the accused had not committed [illegible] has gone to the extent of deciding that illegal seizure and impounding of cattle is not theft even if effected with the malicious intent of subjecting the owner to additional expense, inconvenience and annoyance[3].

Where there is no proof of 'taking' of the property found in the possession of the accused, the offence committed is not theft but criminal misappropriation[4].

Taking need not be with the intention of retaining property permanently.—It is not necessary that the taking should be permanent or with an intention to appropriate the thing taken[5]. The remarks of Norris, J., in *Adu Shikdar's* case[6] that 'with regard to the charge of stealing there is not only no evidence that the prisoner intended to convert it (the property) to his own use, and make it permanently his own property' are in accordance with the English law on the subject, which is quite different from the definition of theft as given in the Code. The learned Judge seems to have overlooked the fact that under the Code a temporary taking might constitute theft (*vide* ill. (*l*).) Where the Hindus of a locality apprehended that X, a Muhammadan who owned a calf, was going to sacrifice that calf and an agreement was come to by which X consented that the calf might be tied up in Y's house, which was close by, but Z, a Hindu, who arrived on the scene subsequently carried away the calf without the consent of X or Y to prevent all [illegible] held that [illegible] when Z [illegible] was only to save it from being killed, and that the act of Z, therefore, amounted to theft[7].

No wrongful gain is necessary.—It matters not whether the intention of the thief was or was not to derive a profit from his crime[8]. Thus, where the accused took the complainant's three cows against her will and distributed them among her creditors, he was found guilty of stealing[9]. Similarly, servants who clandestinely took their *master's oats with intent to give them to their master's horses*, and without any intent to apply them to their own private benefit, were held guilty of larceny, even though they were not answerable at all for the condition of the horses[10]. It makes no difference in the accused's guilt that the act was not intended to procure any personal benefit to himself. Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself?

1 Nabi Bakhsh (1897) 25 Cal. 416.
2 *Rup Lal Singh* v. *Durga Prasad*, (1917) 1 P. L. W. 416.
3 *Arathoon Mondal* v. *Meer Khan*, (1875) 24 W. R. (Cr.) 7.
4 Sheikh Adam (1879) Unrep. Cr. C. 143.
5 See Chern Chaura, (189) 22 Cal. 1017, F. B.; Nabi Bakhsh (1897) 25 Cal. 416; Nagappa, (1890) 15 Bom. 344; (1881) 1 Weir [illegible]; Tirumalapala Chetti (1881) 1 Weir 47 [illegible]; Krishna [illegible] (18[illegible]) 1 Weir [illegible]; [illegible] Chatur, (1897) Unrep. Cr. C. 9[illegible]; [illegible] Mora (1929) 10 P. L. T. 4[illegible].
6 (1885) 11 Cal. 635, 644.
7 *Jogendra* [illegible] (19[illegible]) [illegible] P. L. T. [illegible].
8 P. L. C. (18[illegible]) p. 12[illegible]; [illegible] (1815) R. & R. [illegible].
9 *Mat* [illegible] [illegible].
10 *Privett*, (184[illegible]) 2 C. & K. [illegible]; *Handley* (1842) Car. & M. 5[illegible]; [illegible] (1816) R. & R. 2[illegible].

Bona fide dispute or claim.—Where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal thereof does not constitute theft[1]. The dispute as to ownership must be bona fide[2]. Mere assertion of a fair claim of property or right, or the mere existence of a doubt, is not enough. The claim to property must be proved by evidence to be fair and good[3]. It is the duty of the Court to determine what was the intention of the offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right then it cannot refuse to convict him[4]. Where in asserting his right to some property which a person believes to be good, he does something which he knows he has no right to do, e.g., by taking the law in his own hands and removing such property from the possession of his opponent who claims the property himself, he may be guilty of theft[5]. If there be any fair pretence of property or right in the accused, or if it be brought into doubt at all, the Court should direct an acquittal[6]. In a case of alleged theft of fish from a tank which the accused claimed to have been in their possession and not in the complainant's, it was held that if the accused asserted a claim to the thing alleged to have been stolen by him, he should not be convicted unless the Court was in a position to say that the claim was a mere pretence[7]. It may be safely laid down as a general proposition, though not as a universal rule, that in cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the crops, and a decision on this point will in the majority of cases enable the Court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is a mere pretence. Hence, a person who removes crops from land which is in the possession of another, knowing that the crops have been raised by the latter cannot escape liability for theft by merely proving that he has a bona fide claim of title to the land upon which the crops were grown[8].

A went into possession of the disputed land in 1906. B, the complainant, obtained a decree for possession against A and obtained actual possession of the land in September 1917. Before the execution of the decree, A grew paddy but reaped it on December 14, 1917. It was held that A having been a trespasser on the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession and removed the paddy. Consequently, when the paddy was cut, A had no right to remove it and there was no bona fide dispute[9]. Where the accused, acting as tenants, had planted paddy crops on certain land of which possession was given under a civil Court decree to the

1 *Bhivajee*, (1862) Unrep. Cr. C. 22; *Ravishankar v. Samalal*, (1925) 28 Bom. L. R. 89, 8 Bom. Cr. C. 212; *Khetter Nath Dutt v. Indro Jalia*, (1871) 16 W. R. (Cr.) 68, [78]; *Mahomed*, (1902) 2 S. D. S. S. C. 378; *Algirasawmi Tevan*, (1904) 28 Mad. 304; *Chaitan Charan Maity v. Kala Chand Shamanta*, (1906) 10 C. W. N. 233n; *Arfan Ali*, (1916) 41 Cal. 66; *Sadasiva Singh*, (1917) 1 P. L. W. 155; *Shib Das*, (1913) P. L. R. No. 335 of 1913; *Lakanaw*, (1916) 10 B. L. T. 160; *Madhusudan Das*, (1921) 25 Cr. L. J. 546; *Srinivasalu v. Govinda*, (1922) 44 M. L. J. 138; *Bodh Kishen Goala*, (1923) 4 P. L. T. 608; *Harman Singh*, (1923) 5 Lah. 56; *Tukaram*, (1923) 25 Cr.L. J. 349; *Sobha Mahton*, (1926) 8 P. L. T. 79; *Ismail*, (1926) 2 Lah. C. 341, 27 P. L. R. 635; *Sheonandan Singh*, (1927) 28 Cr. L. J. 949; *Fazl Ali*, (1928) 10 P. L. T. 57.

2 *Hari Bapuji*, (1897) Cr. R. No. 24 of 1897, Unrep. Cr. C. 920.

3 *Nassib Chowdhry v. Nannoo Chowdhry*, (1871) 15 W. R. (Cr.) 47; *Runnoo Singh v. Kali Churn Misser*, (1871) 16 W. R. (Cr.) 18; *Huris Chundra Das v. Bolai Audhicaree*, (1871) 16 W. R. (Cr.) 75; *Madhab Hari*, (1887) 15 Cal. 390n; *Bhagwat Saran Misir*, (1916) 14 A. L. J. 399.

4 *Budh Singh*, (1879) 2 All. 101, referred to in *Sabalsang*, (1902) 4 Bom. L. R. 936; 939; *Pandita alias Rahmatulla Pramanik v. Rahimulla Akundo*, (1900) 27 Cal. 501.

5 *Rangasawmy*, (1927) 6 Ran. 54.

6 2 East P. C. 659. See *Harendra Narayan v. Ramjan Khan*, (1913) 41 Cal. 433.

7 *Dhirendra Mohan Gossain*, (1909) 14 C. W. N. 408; *Hari Bhuimali*, (1905) 9 C. W. N. 974; *Ram Lal Singh v. Hari Charan Ahir*, (1909) 11 C. L. J. 410.

8 *Abdul*, (1928) 30 Cr. L. J. 511; *Bhan Prasad v. Brahammdeo*, (1927) 9 P. L. T. 375.

9 *Abinash Chandra Sarkar*, (1918) 28 C. L. J. 120, 23 C. W. N. 385.

claimant, and the accused removed the crops planted by them believing they had a right to the same, it was held that they had acted under a claim of right and were not guilty of theft[1]. Where the accused were convicted of theft for having cut and removed crops which had been sown by the complainant, and in appeal the accused raised the point that the crops stood upon fields which were in the cultivatory possession of themselves, it was held that it was immaterial whether the complainant had or had not good title to cultivate the fields, that it was sufficient that he sowed the crops, and that the accused were rightly convicted[2]. Where the accused snatched his cooking utensil from the hands of a civil Court bailiff, who had attached it, and asserted that he did so as the utensil was exempt from attachment under s. 60, Civil Procedure Code, it was held that he was not guilty of theft[3].

Mistake.—If a person takes another man's property, believing, under a ... to it, he is not guilty ... may cause wrongful ... notion of law, and believing that certain property is his, and that he has the right to take the same, until payment of the balance of some money due to him from the vendor, removes such property from the possession of the vendee[4].

Stealing one's own property. The owner of moveable property cannot be found guilty of the theft of the property. A person can be convicted of stealing his own property if he takes it dishonestly from another (*vide* ills. (*j*) and (*k*))[5]. If A delivers goods to B to keep for him and then steals them with intent to charge B with the value of them this would be felony ...

... Where the ... of a con... the constable had special property in it and the accused was therefore guilty of theft[3]. But if there is no dishonest intention it will not be theft (*vide* ill. (*i*)). Thus, retaking of cattle unlawfully restrained will not amount to theft[9]. If goods have been seized by the sheriff under an execution levied on the property of some person other than the owner of the goods, the owner, by taking possession of them, cannot be guilty of larceny[10].

Liability of a servant for an act done at the direction of his master.—A servant is not guilty of the offence of theft when what he does is at his master's bidding, unless it is shown that he participated in his master's knowledge of the dishonest nature of the fact. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred[11]. Where a servant, knowing perfectly well that his master is removing the goods of another without even a pretence of right, assists him in doing so, he acts dishonestly and is equally guilty along with his master of the offence of theft[12].

Cases.—Dishonest intention.—The accused was the brother of a farmer or contractor of a public ferry. He seized a boat belonging to the complainant while ...

... realised from fees to be paid by

1 *Sil Pera* (1923) 2 B. L. J. 100.
2 *Mahammad Ali*, (1921) 19 A. L. J. 961.
3 *Lunidewal*, (1915) 9 S. L. R. 75.
4 *Nagappa* (188) 15 Bom. 344.
5 *Hamid Ali Bepari*, (1925) 52 Cal. 1015.
6 *Lakshmana Goundan*, (1926) 28 M. L. T. 163.
7 1 Hale P. C. 513. See *Rowell Wilkinson*, (1821) R. & R. 470.
8 *Sheik Hussain* (1897) Unrep. Cr. C. 343.
9 *Yegmurthi Thevan*, (1883) 1 Weir 422.
10 *Thomas Kay*, II, (1908) 1 Cr. App. R. 186.
11 *Hari Bhumik*, (1906) 9 C. W. N. 974.
12 *Barhamdeo Rai*, (1925) 7 P. L. T. 272.

prevented from using the creek. The accused had no reason to believe that he was justified in retaining the boat. It was held that the accused was guilty of theft, though it was not his intention to convert the boat to his own use, or deprive the complainant permanently of its possession[1]. Where the accused was found to have loosened the complainant's cattle at night from a cattle pen, and to have driven them to the pound with the object of sharing with the pound keeper the fees to be paid for their release, it was held that the offence committed was that of theft[2].

The accused, an employee under a Steamer Company, whose business it was to check the tickets of passengers, asked to see the complainant's ticket, but the complainant not having got one, the accused took possession of his umbrella as security that he might be compelled to pay his fare, it was held that there being no suggestion that the accused intended either to get any wrongful gain to himself by compelling payment of the fare, or to cause any wrongful loss to the complainant who was bound to pay his fare, a conviction for theft could not be made[3]. Accused entered into an agreement with the complainant that the latter should advance him money up to a certain sum on the hypothecation of goods to be deposited by him as security. The goods were deposited in a godown, and under the agreement accused was entitled to take advances up to seventy per cent. of the value of the goods. Some time afterwards, the accused removed some of the hypothecated goods from the godown. It was held that the removal of the goods not having been proved to be honest, the accused was guilty of theft[4].

Removal of a debtor's property by his creditor to enforce payment of debt.—A creditor who took moveable property out of his debtor's possession, without his consent, with the intention of coercing him to pay his debt, committed the offence of theft. The Court said: "We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of s. 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things in which every man might, if strong enough, take the law into his own hands"[5]. Where the accused unyoked the bullocks belonging to the complainant and took them away on the ground that the complainant's brother owed him Rs. 20 and suggested permission of the complainant to the act, but adduced no evidence, it was held that even if the complainant offered no resistance to the taking through fear of opposing the accused it was dishonest taking which was covered by the provisions of this section[6]. The complainant pledged some fishing nets with the accused. The nets remained in possession of the complainant, but the accused was at liberty to sell the goods if within three years the debt was not paid. The debt was not paid within the stipulated time and the complainant sold away one of the nets pledged. The accused, in the absence of the complainant, removed the nets. It was held that she could not be convicted of theft as it might fairly be contended that she bona fide supposed that she was justified in her action[7]. Where the accused, a ship-

[1] *Nagappa*, (1890) 15 Bom. 344.
[2] *Paryag Rai* v. *Arju Mian*, (1894) 22 Cal. 139.
[3] *Malabbar Sheikh*, (1910) 14 C. W. N. 936; *Daulat Shaw*, (1921) 2 P. L. T. 583.
[4] *Kartikeswar Roy* v. *Bansidhar Byas*, (1923) 25 Cr. L. J. 222.
[5] *Sri Churn Chungo*, (1895) 22 Cal. 1017, 1022, F. B., overruling *Prosonno Kumar Patra* v. *Udoy Sant*, (1895) 22 Cal. 669; *Agha Muhammad Yusuf*, (1895) 18 All. 88; *Bakhtawar*, (1924) 1 Lah. C. 56.
[6] *Munusawmy Pillai*, (1910) 4 Cr. L. R. 19.
[7] *Dhaklu*, (1902) 4 Bom. L. R. 56; Weir (3rd Edn.) 245; *Nga Shwe Meik*, (1900) 1 U. B. R. (1897-1901) 339.
[8] *U. Si Noor Mahomed*, (1883) Weir (3rd. Edn.) 246.